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HOMESTEAD LAND—NO OCCUPANCY RIGHTS.

* There is no law in this country which gives anything in the nature of a protected tenure or holding to a person who has occupied a piece of homestead-land, however long may have been the period of his possession. If there is any hardship in evicting a tenant who has held such land for a long period of time the hardship is one for which the law prescribes no remedy, and in the present state of the law, the only advisable course to be pursued by the parties concerned is to protect themselves by contract from what may be in the opinion of some an arbitrary eviction. (*See Prosonno Comaree Debee v. Sheikh Rutton Bepari, I. L. R., 3 Calc. 696.*)

AGREEMENT TO QUIT LAND WHEN THE LESSOR REQUIRES.

* Any agreement between the lessor and a lessee to the effect that the latter would relinquish the land whenever required to do so, being an indefinite one, has no binding force, as there is nothing to determine which of the two contracting parties is to be the judge of the conditions and circumstances under which a landlord is entitled to say that he requires the land.

REVIEWS.

We beg to acknowledge with thanks the receipt of a copy of "The Compendium of Criminal Rulings. Part II," from Babu Kedar Nath Ghosh, B. L., of the subordinate executive service, Bengal. It contains the substance of all the criminal rulings reported in the complete series of the Indian Law Reports for 1880, illustrated by copious

* The above two paras are taken from a recent judgment of the Calcutta High Court, of which the portion containing the no, date and names of parties has been lost in our office.—*Ed.*

extracts from the judgments in all important cases, with a brief outline of facts as well as a copious index, a table of cases and notes. It is really a very useful work,—useful to those who have anything to do with the Criminal Courts of this country. We have been given to understand that Part I of the “Compendium” contains the substance of the criminal cases reported in all the volumes of the Bengal Law Reporter, and the Indian Law Reports from 1876 to 1879. It thus manifestly appears that the author means to continue the series by publishing, in parts, the substance of all the rulings that have been reported this year and may be reported hereafter. If the author really intends to do so, he certainly deserves to be thanked by those who cannot afford, or do not like for the sake of a few criminal rulings, to purchase the entire and costly series of the Indian Law Reports.

We have great pleasure to acknowledge with thanks the receipt, from the author himself, of a copy of “The Law relating to Hindu Widows” by T. N. MITRA, Esq., D. L. It contains the Tagore Law Lectures delivered by him, in the year 1879. We have read the work with much interest and can well say that it has been ably compiled with conspicuous industry and a great research, and is highly creditable to Dr. Mitra. As a work of reference, the book will prove extremely valuable. The author's remarks regarding some of our legislative measures and judicial decisions deserve the prompt and careful consideration of the legislature and the courts of this country. The work is really a valuable one. We cannot too highly speak of its merits. Every lecture is instructive and useful. Even the first one “On the Sources of Hindu Law” contains a fund of information which will amply repay perusal. We have no hesitation to gladly recommend the book to our readers and the public. And we think, we should, in proof of our remarks, make some extracts. We believe the following will suffice:—

THE WIDOW'S RIGHT OF SUCCESSION.

Almost all the authorities current in the different schools are agreed in recognising the title of five female relatives to succeed to the property of a Hindu dying without male issue and intestate. These are :

1. The widow.
2. The daughter.
3. The mother.
4. The grand-mother.
5. The great grand-mother.

By none of the schools is the *sister* recognised as an heir, except the *Maharashtra* school.*

Of the five female relatives mentioned above, the widow succeeds first.

According to the rule† of the *Mitacshara* followed by the other schools, except Bengal, the widow takes the whole estate of a man who being separated from his co-heirs, and not subsequently re-united with them, dies leaving no male issue ; in the case of undivided property, the widow does not succeed, ‡‡ she is only entitled to maintenance. According to the Bengal school, the widow succeeds to the estate of her husband whether he was united or separated.§

The widow, however, who succeeds to the estate of her husband is, according to all authorities, the *chaste* widow ; or, in other words, the widow who, during her husband's life-time, was not guilty of unchastity.|| A wife who commits adultery during the life-time of her husband loses her right to inherit her husband's estate, unless the act is condoned by her husband or expiated by penance.

* Bhaskar Trimback Acharya v. Mahadev Ramji and others,—6 Bom. H. C. R., 1 ; Venayeck Anund Row v. Luxumee Bai and others,—9 Moore's I. A., 516.

See *Vyavahara Mayukha*, Chap. IV, Sec. VIII., para. 19.

+ See *Mitacshara*, Chap. II, Sec. I., paras. 30 & 39 ; *Vyavahara Mayukha*, Chap. IV., Sec. VIII., para. 7.—*Ed.*

‡‡ Runjeet Singh v. Obhoy Narain Singh, 2 Sel. Rep., p. 315.

(See also *Vyavahara Mayukha*, Chap. IV., Sec. VIII., para. 6.—*Ed.*)

§ See *Dayabhaga*, Chap. XI., Sec. I., para. 3 ; *Daya-crama Sangraha*, Chap. I., Sec. II., para. 1.—*Ed.*

|| *Kerry Kolitanee v. Moniram Kolita*, 19 W. R., 367 *et seq.*

¶ *Matunginee Debea v. Joy Kali Debea*, 14 W. R., 23, A. O. J.

If a man dies leaving more widows than one, all his widows succeed to his estate together ; the estate to which they succeed is one estate in law, with the right of survivorship attached to it, so that on the death of one widow, her interest survives to the surviving widows, and does not descend to the other heirs of her husband. So long, therefore, as a single widow is alive, no portion of the husband's estate can descend to the other heirs of her husband.*

If two widows effect, among themselves, a partition of their husband's estate, by such partition the right of survivorship is not destroyed. The right of survivorship is so strong that the survivor takes the whole property to the exclusion of the daughters of the deceased widow.†

The widow succeeds to such property of her husband, as he was possessed at the time of his death, or was entitled to at that time. The widow does not, for the purposes of inheritance, represent the husband ; (*i. e.,*) the widow will not be entitled to any property to which her husband, if living, would have been entitled by right of inheritance ‡

If the husband, however, had been entitled to property of which he did not or could not take possession during his life-time, then, on his death, his widow, as his heiress, would be entitled to sue, if the law of limitation did not bar her, to recover possession of the said property, the cause of action in such a case descending to the widow. The widow would also be entitled to succeed to possession of the property in which her husband had a vested interest under a will or deed, the actual enjoyment of the same by her husband having been postponed by an intervening life-estate.§

There is a class of persons whom the Hindu law has declared incapable of inheriting. They are as follows:- "Impotent persons, outcasts, persons born blind and deaf, madmen, idiots, dumb persons, and those who have lost a sense or a limb."|| Lepers and religious

* Bhuglauty Raur v. Radhakissen Mookerjea, Montrou's Cases, 314,

† 11 Moore's I. A., 487. Bhurwandeen Debee v. Myna Baee.

‡ Hurosunderee Debee v. Rajessuree Debee, 2 W. R., 321.

§ Hurosunderee Debee v. Rajessuree Debee, 2 W. R., 321; Rewan Persad v. Mussamut Radha Babee, 4 Moore's I. A., 137.

|| Menu, Chap. IX., V. 201.

mendicants are also included* in this category. These persons are excluded from the inheritance. Their widows, therefore, take nothing, since they themselves took nothing ; although their sons, who are free from those defects, would inherit property which they, but for those defects, would have themselves inherited. The widows of such persons however are entitled to maintenance to the end of their lives, and Yajnwalkya adds, on condition of their conducting themselves aright.† But if they are unchaste, they should be expelled.

The Hindu law, however, only declares that these persons (im-potent, &c.) are incapable of *inheriting* property ; there is no authority which declares that they are incapable of *holding* property (like persons attainted in English law). Therefore, a person falling within this category is perfectly competent to acquire property by purchase or gift or the like ; and their widows would succeed to any such property which they might have held during their life-time.

All the schools agree, as a rule, in regarding the widow's estate as a representative estate, as typical of the estates which the other female heirs have in the property of their male relatives.

OBLIGATIONS OF WIDOWS.

How far the Hindu widow is obliged in these days to observe the strict mode of life enjoined upon her, was the subject of discussion before the Bengal High Court.‡ The suit was one for maintenance brought by the stepmother against her stepson ; and the defendant pleaded, in diminution of the plaintiff's claim, that by the *Shasters* she is bound to lead a very strict and austere life, and, consequently, the amount claimed was excessive. On this the Court observed as follows :—“ As to the life of semi-starvation and wretchedness, in which it is argued that, according to the *Shasters*, a Hindu widow ought to live, that is a matter of religious or ceremonial observance rather than of law. A Hindu widow is in these days at all events entitled to decent food and clothing if the head of the family is in a position to supply them.”

* Devala.

† Dayabhaga, Chap. V., para. 19.

‡ Mitachara, Chap. II., Sec. I., para. 21.

§ Hurry Mohun Roy v. S. M. Nayantara, 25 W. R., 474.

OBLIGATIONS OF WIDOW AS AN HEIRESS.

The leading case of *Kerry Kolitanee* v. Moniram Kolita*, established the following points :—

1. The widow is not a *trustee* in the sense which is ordinarily attributed to that word.
2. That as other female heirs, such as the daughter, &c., do not forfeit their estate if they fail to perform duties for which the estate was conferred upon them, there is no reason for declaring, in the case of the widow, that she forfeits her estate for such incapacity. A daughter, who had succeeded as a spinster, would continue to hold the estate even after the death of her childless husband, when she becomes wholly inefficacious to confer benefits for which she was selected.
3. The widow's estate is not conditional upon her using it for the purpose of benefiting her husband.
4. The proposition that, if a trustee is not in a position to fulfil his duties, the trust property must be taken away from him, is not correct either in Hindu or in English Law.
5. The text of Katyana, "let the childless widow preserving unsullied the bed of her lord, &c.," is not to be interpreted as making the enjoyment conditional upon her keeping unsullied the bed of her lord.
6. The proposition that an estate once vested cannot afterwards be divested, is unsupported by authorities in Hindu Law.
7. There is no analogy between the widow's estate and the widow's maintenance.
8. That the estate once inherited by the widow is not forfeited simply by unchastity.

The result, on an examination of the authorities† regarding the widow's obligation to reside with the members of her husband's family, may be summed up as follows :—

1. The widow is not obliged to reside with her husband's family.

* 19 W. R., 367.

† *Kasinath Bysack v. Hurosunderee Dossee*, Montriou's Cases of Hindu Law, p. 495; *Oma Debia v. Kishen Moni Debia*, 7 Sel. Rep., p. 323; *Raja Pirthee Singh v. Ranee Raj Kower*, 20 W. R., 21; *Jadu Moni Dasi v. Khetra Mohun Sil*, Shama Churn Sircar's Vyavastha Darpana, p. 384; *Surnomoyee Dossee v. Gopal Lal Dass*, 1 Marshall, 497.

2. That she has a perfect freedom of choice in the matter of her residence, provided the residence be not improper or be not for unchaste purposes.

3. By the voluntary change of residence, or by refusal without any cause to reside with her husband's family, she does not forfeit her right to the property of her husband.

4. Nor does she forfeit her right to maintenance from the heirs of her husband, to whom her husband's property has passed on his death.

NATURE AND EXTENT OF WIDOW'S ESTATE.

The following propositions* may be considered as established:—

1. The widow must enjoy the estate during her life.
2. The enjoyment must be by a moderate use of it.
3. The use should not be by wearing delicate apparel and similar luxuries.
4. She is not entitled to make a gift, mortgage, or sale of it.
5. But a gift or other alienation is permitted for the completion of her husband's funeral rites.
6. If the widow is unable to subsist otherwise, she is authorised to mortgage, sell, or otherwise alienate it.
7. The widow is permitted to make presents to the *sapindas* and other relatives of her husband at his funeral rites.
8. With the consent of her husband's relatives, she may bestow gifts on the kindred of her own father and mother.
9. The widow is enjoined to give to an unmarried daughter a fourth part out of her husband's estate to defray the marriage expenses of the girl.
10. On the death of the widow the property goes to the heirs of her husband, and not to the heirs of her *stridhan*.
11. The property inherited by the widow does not become her *stridhan*

* See *Dayabhaga*, Chap. XI. Sec. I., paras. 56 to 66.

The substance of the reported cases on the subject of the widow's estate may be stated to be as follow:—

1. That the widow completely represents the estate.*
2. That generally whatever bars the widow would also bar the reversioners.*
3. That by her alienation she conveys an absolute interest under certain circumstances.
4. That the circumstances under which she conveys an absolute interest, it is very difficult generally to define.†
5. She is not a mere life-tenant.‡
6. The extent of her interest over moveable and immoveable property is, in Bengal, the same.§

A reversionary heir, who is bound by a decision against the widow respecting the subject matter of inheritance, is also barred by limitation, if without fraud or collusion the widow is barred by limitation.

The reversioner has the right of bringing a suit against the widow and the adverse holder for the purpose of having the estate reduced into proper possession. In such a case, the possession of the property so recovered shall not be given to the reversioner, but a manager should be appointed by the Court to take charge of the property and to account, to the Court, of all the rents and profits, and the Court shall hold the same "for the benefit of the heirs who may happen to succeed on the death of the widow."||

* Goluck Money Debee *v.* Digumbur Dey, 2 Boulnois' Rep., 193; Katama Natchiar *v.* The Raja of Sivagunga, 9 Moore's I. A., 539; Nobin Chunder Chuckerbutty *v.* Issur Chunder Chuckerbutty, 9 W. R., 505.

† Jodoomonee Debee *v.* Saroda Prosunno Mukerjea, 1 Boulnois, 129.

‡ Kasinath Bysack and another *v.* Hurrosundery Dossy, Montrou's Cases, p. 495.

§ Nobin Chunder Chuckerbutty *v.* Issur Chunder Chuckerbutty, 9 W. R., 508; Amrito Lall Bose *v.* Rojoni Kant Mitter, 23 W. R., 214, and Mussamut Bhogbuti Daye *v.* Chowdry Bhola Nath Takoor and others, 24 W. R., 168.

|| Radhamohun Dhur *v.* Ramdoss Dey, 3 B. L. R., 363; Nobin Chunder Chuckerbutty *v.* Issur Chunder Chuckerbutty, 9 W. R., 505.

It is not strictly correct to say that the widow is a trustee and her estate a trust estate.* By the Hindu law, the widow holds the estate for her own benefit. She is entitled to enjoy the usufruct of the property during her life, and the alienations of the property by her, in some cases stand good and pass an absolute interest to the alienee.

A Hindu widow has no power to alienate the profits of the estate which she had inherited from her husband, and any property which she may purchase from such profits would become an increment to the estate which she had inherited, and would follow that estate in its devolution.†

The result of the decisions regarding the widow's power over the estate inherited by her from her husband may be thus summed up :—

1. The widow has full power to spend the current income in any manner she thinks proper.‡
2. If property is purchased from those profits, it is doubtful whether she has the absolute power to alienate it.§
3. If she leaves property so purchased undisposed of at her death, it will form part of her husband's estate and follow the same in its devolution.||

How far a widow can claim partition by metes and bounds from the co-parceners of her husband may sometimes be a question. The point seems to have been expressly raised in a recent case¶, in which the Court ruled that it was discretionary with the Court to order a partition at suit of the widow. If the widow was childless and her share

* 19 W. R., 409; 20 W. R., 187.

† 24 W. R., 168, *Mussamut Bhugbuty Daee v. Chowdry Bholanath*—(Privy Council case.)

‡ *Chundrabulee Debia v. Brody*, 9 W. R., 584; *Grose v. Omirtomoyee Dossee*, 12 W. R., p. 13, A. O. J.; In the goods of Hurrender Narain Ghose, Kashee Nath Ghose v. Bissonath Biswas, *vide Englishman* dated the 2nd July 1853; *Sreemutty Puddomony Dossee v. Dwarkanath Biswas*, 25 W. R., 335.

§ Against the widow's power :— *Mussamut Bhugbuty Daee v. Chowdry Bholanath*, 24 W. R., p. 168.

For the widow's power :— *Gonda Koer v. Kooer Oodey Singh*, 14 B. L. R., 159.

|| *Mussamut Bhugbuty Daee v. Chowdry Bholanath*, 24 W. R., p. 168.

¶ I. L. R., 2 Calc. 262, *Soudaminy Dassy v. Jogesh Dutt*.

small, probably the Court will not order a partition, as the defendants themselves in such cases are usually the reverters of the widow. But where the widow's share is large, and she has children, in such cases partition will be ordered.

In a undivided family according to the Mitacshara, the self-acquired property of one co-sharer will, on his death, devolve on his widow if he has no male issue; but the joint family property will go to his male coparceners. The interest of a widow so succeeding to her husband's estate is similar to that of a tenant-in-tail by the English law as representing the inheritance. An important principle is here established, *viz.*, the distinction between the self-acquired property and the joint family property in an undivided family governed by the Mistacshara, the former will descend to the widow, but the latter will go to the undivided coparceners.*

According to the Bengal and the Benares schools, there is no difference between the moveable and the immoveable property inherited by the widow; and her powers of alienation as regards both are restricted within very narrow limits.†

ALIENATIONS BY THE WIDOW.

The general rule of Hindu law is, that as regard's the property inherited by the widow from her husband she is incompetent to alienate it, except for *legal necessity*.‡

According to Jimutavahana any expenditure incurred which is useful to the late owner would come within the category of legal necessity, and would justify the widow's alienation.§ The spiritual welfare

* 9 Moore's I. A., 539, Katama Natchier *v.* The Raja of Sivagunga.

+ Kasinath Bysack *v.* Hurrosoondery Dassee Montriou's Cases, 495; Bhagwandeen Dobey *v.* Mayna Baee, 11 Moore's I. A., 487. There is an earlier case, (Mussamut Thacoor Daee *v.* Rai Baluck Ram, 11 Moore's, 139,) wherein the Privy Council expressed a somewhat different opinion as to widow's power over moveable property, but that case seems to have been over-ruled (though not expressly) by the later one.—*Ed.*

† Dayabhaga, Chap. XI., sec. i., para 61.

§ Daya-craina-Sangraha, Chap I., sec., II., paras 3 and 6; Daya-bhaga, Chap. XI., sec. I., paras. 56 and 62; Vyavahara Mayukha, Chap. IV., sec. VIII., para. 4.—*Ed.*

of the late owner is here meant, or acts beneficial to the soul of the deceased in the next world. Acts of religion highly meritorious on the part of the widow may have no effect on the spiritual welfare of her late husband. Therefore, it has been held, that such acts, of which the religious efficacy benefits the widow and not the husband, will not justify an alienation of the property inherited by the widow.* Hence it was held, that a widow could not endow an idol with her husband's property to the detriment of the reversioners.

The first case of legal necessity justifying alienation by the widow is her own maintenance. If, however, the reversioners for the time being provide the widow with her maintenance, there is no necessity for the widow to sell either the whole or a portion of the estate inherited by her. A sale by the widow under such circumstances will therefore be invalid, the necessity justifying a sale being wanting.†

If the income of the husband's estate is insufficient to maintain those persons whom the widow is bound to maintain, then the widow will be justified in alienating a portion of such estate to defray the expenses of such maintenance, and the sale taking place under those circumstances will stand good and cannot be impeached by the reversioners.

The marriage of unmarried daughters is one of the objects for which the Hindu law allows the widow to alienate a portion of her deceased husband's estate; consequently a debt contracted for this purpose should be a charge on the estate of the deceased, and not on the widow personally.‡

But the most important case in which the widow is allowed to alienate the property is for the purpose of conferring spiritual benefits on her late husband. For performing her husband's *sraddha*, the widow, therefore, is entitled to alienate either a portion or the whole of the inheritance, and the alienation is allowed whether it be for performing the *ekodista sraddha* (that is, the first *sraddha* performed on the eleventh day after death among Brahmims, and on the thirty-first day after

* Kartie Chunder Chuckerbutty *v.* Gour Mohun Roy, 1 W. R., 48; See Huro Mohun Adhikaree *v.* Aluckmoney Dossee, 1 W. R., 252; Runjeetram Koolal *v.* Mahomed Waris, 21 W. R., 49.

† 2 Macnaghten, 211.

‡ Preagnarain *v.* Ajodhya Prosad, 7 Sel. Rep., 602.

death among Sudras,) or the other *sraddhas* of the deceased that are performed six-monthly or annually or at stated days in the year. These ceremonies performed, directly benefit the deceased, and the widow is, therefore, bound to perform them.

For performing the other obligations of religion, it would appear that the widow is allowed to alienate a small portion of the inheritance.*

A pilgrimage to Gya, for the purpose of performing the husband's *sraddha* there, is considered a legal necessity justifying the alienation by the widow.† Pilgrimage to Benares, however, is not a legal necessity.‡

The payment of the husband's debts is another instance of necessity justifying the widow's alienation of her husband's property.§ The widow, however, is not justified in alienating the property for the payment of her personal debts, unless those debts were the consequence of prior debts owing by her husband. As for instance, where the widow executes a bond for the payment of her husband's debts, or in renewal of a bond due from him. In such cases the liability of the widow is not personal ; the estate of the husband is liable, and property sold for such debts by the widow will be valid as against the reversioner. The widow will convey a good title to the alienee.

The widow, however, it has been held, is not justified in selling her husband's property to pay a debt, due from her husband, which has been barred by the Statute of Limitations. The payment of such a debt is not a legal necessity, and a sale on account of it is not justifiable||.

Debts incurred by the widow for preserving the estate, and the payment of such debts, would warrant an alienation of a portion of the estate, and would be treated as a legal necessity.¶

Payment of revenue due to Government will justify an alienation when the same cannot be met from other sources.**

* 4 Sel. Rep., 420; 1 Sel. Rep., 82; 1 Sel. Rep., 215; 4 Sel. Rep., 147.

† Mahomed Ashruf v. Brijessuree Dossee, 19 W. R., 426.

‡ Huromohun Adhikari v. Aluckmoney Dossee, 1 W. R., 252.

§ See Haris Chunder Roy v. Nandalal Dutt, S. D. A. Dec. for 1862. Coono-monee Debee v. Bhugbuty Dossee, S. D. Rep. for 1845, p. 299.

|| Melgirappa v. Shevappa, 6 Bom. Rep., 270.

¶ Sheikh Mulcoolah v. Radhabinode Misser, S. D. R. for 1856.

** Sreenath Roy v. Ruttanmala Chowdhraian, S. D. R. for 1859, p. 421.

Advances made to the widow for her own maintenance and for the costs of carrying on a litigation to recover the estate of her husband have been held to be legitimate charges on the estate, which will bind the reversioner.*

Money borrowed by the widow to carry on litigation will not be a charge on the estate, unless it be for the benefit of the estate.†

But if money is advanced to a widow, after due and proper enquiry, for carrying on a litigation to realise her husband's estate, the amount so advanced shall be a charge upon the estate binding on the reversioners.‡

The widow is authorised to make gifts to her husband's relatives at his funeral obsequies; and this for the purpose of securing his spiritual welfare, the gifts being in proportion to the estate of her husband. The widow, however, as a rule, is precluded from making gifts to the family of her own father. The author of the Dayabhaga, however, has laid down that, with the consent of her husband's relatives, the widow may bestow gifts on the kindred of her own father and mother.§

If the widow alienates her husband's property for other than allowable causes, the purchaser is entitled to possession of the property purchased, and to acquire in the property all the rights which the widow possessed; and the alienation shall stand good during the period of the widow's natural life.||

When a sale by a Hindu widow is questioned, the purchaser is bound to show that the transaction is within her limited powers.¶ Where the legal necessity is questioned, its extence must be shown by the person standing on the conveyance.**

* *Grose v. Omertomoyee Dossee*, 12. W. R., 12, O. J. A.

† *Mussamut Phool Koor v. Debee Persaud*, 12 W. R., 187.

‡ *Grose v. Omertomoyee*, 12, W. R., 12, O. J. A.

§ *Dayabhaga*, Chap. XI., sec. i., para. 64.

|| *Mayaram Bhakram v. Motiram Gobindram*, 2 Bom. H. C. Rep., 331, Tariny Churn Banerjea v. Nund Coomar Banerjea, 1. W. R., 47; *Bogoon Jha v. Lall Dass*, 6 W. R., 36; *Ranee Prosonno Mooyee v. Ram Chunder Sen*, S. D. R for 1859, 163; *Gobind Monee Dossee v. Sham Lall Bysack*, W. R., Sp No. p. 165.

¶ *The Collector of Masulipatam v. Cavalry Vencata Narainapah*, 8 Moore's I. A., p. 529.

** *Bissonath Roy v. Lall Bahadur*, 1 W. R., 247; *Rajluckhee Debee v. Gocool Chunder Chowdry*, 12 W. R., 47, P. C. R.

Generally, it may be said, that a purchaser from the Hindu widow does not occupy the same position as any other purchaser in whose favor certain presumptions will be raised under ordinary circumstances. A purchaser from the Hindu widow has an exceptional and onerous position. He must show strict good faith in his dealings with her. By law the widow has a limited power of alienation over the property inherited by her ; her disability is general, her ability exceptional ; and the presumption of good faith will not, therefore, be raised in favor of the purchaser, who must prove the same when it is questioned.

Though a purchaser for value is not bound to prove the antecedent economy or good conduct of the widow who alienates a portion of her husband's estate, or to account for the due appropriation of the purchase-money, he is bound to use due diligence in ascertaining that there is some legal necessity for the loan ; and he may be reasonably expected to prove the circumstances connected with his own particular loan.*

Though the purchaser is bound to prove the existence of a legal necessity when the widow's sale is questioned, he is not bound to look to the actual appropriation of the purchase-money by the widow.† The mere fact of the whole of the purchase-money not being paid to the creditors will be no ground for invalidating the sale.‡ But whether the purchase-money is adequate, is for the purchaser to prove. The sale being questioned on this ground, the purchaser is bound to show that the consideration-money paid by him represents a fair value of the property purchased.§

It has been held, having regard to the rights of the reversioners, that an alienation of a part of or a charge upon the estate, for the purpose of preserving the whole estate will be valid as against the reversioners, because by such an act the widow benefits the reversioners.

A widow, by relinquishing her estate in favor of the apparent next takers, can convey an absolute title to the alienee unimpeachable by any

* Gobind Monee Dossee v. Sham Lall Byack, Gap. No. W. R., p. 153.

† Gunga Gobind Bose v. S. M. Dhunee, 1 W. R., 59 ; Nuffer Chunder Banerjee & Gudadlur Mundle, 3 W. R., 122 ; Gopal Chunder Manna v. Gour-monee Dossee, 6 W. R., 52.

‡ Rau Gopal Ghose v. Bullodeb Bose, Gap. No., W. R., 385.

§ Jodu Nath Sircar v. S. M. Soramoney Dossey, Wyman's Rep., 70.

other reversioner.* The surrender must be in favor of *all* those persons who stand in the position of next takers to her. If the surrender is in favor of some of the next takers to the exclusion of others of the same class, such an act will not be valid, because the excluded person will be entitled to complain, and as against him the alienation will not be good. But if the surrender is in favor of the *second* reversioner with the consent of the *first* reversioner, it passes an absolute title.†

When the widow incurs a liability, and it is incurred not for satisfying a legal necessity, but on any other account, a decree obtained against the widow on the basis of such an obligation will not bind the estate of her husband, and the sale under it will be a sale of her life-interest.‡ On the other hand, if the debt was incurred for a legal necessity, the whole estate would pass upon a sale in execution of such a decree.§ If, however, the decree is obtained against the widow in her representative character, either as the representative of her husband or as the guardian of her minor son, the sale under it will pass the whole estate.||

Where the decree is obtained against the widow as representative of her husband, *i. e.*, on account of a debt due from her late husband,—the estate of the husband will pass to the purchaser, and not the mere life-interest of the widow; and this although the sale-notification might state that the interest of the judgment-debtor, *viz.*, the widow, was sold.¶ In such a case what property was actually sold is to be seen, and not the form of the sale-notification, and as the debts were the debts of the former owner, the husband of the widow, the sale will pass the rights of the former owner.**

* Jadumoni Debi v. Saroda Prosonno Mukerjee, 1 Boulois Rep., 120; Protap Chunder Chowdry v. S. M. Joymonee Debbee, 1 W. R., 98; Shama Sundaree v. Surut Chunder Dutt, 8 W. R., 500; Kalee Coomar Nag v. Kashee Chunder Nag, 2 Wym., 212; Rojonikant Mitter v. Pranchand Bose, Marshall, 241.

† Protap Chunder Roy v. S. M. Joymoney Debbee, 1 W. R., 98.

‡ Kisto Moyee Dossee v. Prosunmo Narain Chowdry, 6 W. R., 303.

§ Bistoo Behary Sahoy v. Lalla Byjnath Persad, 16 W. R., 49.

|| Goluck Chunder Paul v. Mahomed Rohim, 9 W. R., 316.

¶ Kalee Churn Mitter v. Sheebdyal Tewaree, S. D. A. for 1859, p. 996; Burk Ali v. Esban Chunder Mitter, W. R., Sp. No. 119.

** General Manager of the Raj Durbhunga v. Moharaj Coomar Romaput Sing, 11 Moore's I. A., 605.

When a decree for rent is obtained against a widow as the possessor of a talook, and in execution of that decree, the defaulting tenure was sold, the effect of such a sale will be to pass to the purchaser not merely the life-interest of the widow, but the whole tenure.* This is because the zemindar has the right, either by express agreement or by law, in case of a default in the payment of rent, to sell the tenure as constituted at the time of its creation, irrespective of the rights of the holder of the tenure for the time being.†

THE RIGHTS OF THE REVERSIONERS.

The persons whose interests are affected by the widow's alienations being the reversioners, it is reasonable to hold that, if they give their consent to such alienations, the alienations will be valid ; and this, for two reasons—*first*, because the consent of the reversioner will be evidence of the existence of necessity justifying alienation ; and *second*, because the reversioner, by giving his consent to the alienation, will be estopped from questioning its validity afterwards. Therefore, independent of the question of legal necessity, the widow's alienations will be absolutely valid if the reversioners have given their consent to such transactions ‡

The doctrine of consent is founded upon the presumption that, when the reversioner gives his consent to the widow's alienation, he has satisfied himself that the transaction was one which the widow was, under the circumstances, justified in entering into ; in other words, that it was not a wanton act on the part of the widow, but that it was one for which there was legal necessity.§

* *Anund Moyee Dossee v. Mohender Narain Doss*, 15 W. R., 264; *Mohima Chunder Roy Chowdry v. Ram Kissore Acharjee Chowdry*, 23. W. R., 174.

† *See Rajkissen Sircar v. Chowdry Jaheerlal Huq*, Gap. No. W. R., 351.

‡ *Gocul Chund Chuckerbutty v. Musst. Rajranee*, 2 Sel. Rep., 213; *Hem Chunder Mozoondar v. Musst. Taramunee*, 1 Sel. Rep., 481; *Brindabun Chunder Rai v. Bishun Chund Rai*, 4 Sel. Rep., 180; *Musst. Bejoya Debec v. Musst. Upnopoorno Debec*, Note, 1 Sel. Rep., 215; *Rajlukhee Debec v. Gocoool Chunder Chowdry*, 12. W. R., 47, P. C. R.

§ *Kali Mohun Deb v. Dhunonjoy Saho*, 6 W. R., 51; *The Collector of Masulipatam v. C. V. Narainapah*, 8 Moore's I. A., 529, 550.

It has been held in some cases* that, if a reversioner gave his consent to an alienation, and died during the widow's life-time, his heirs will be bound by such consent.

The consent of the reversioner to the widow's alienation may be given in various ways. The mere attestation of the widow's deed of alienation by the reversioners is not conclusive evidence of their consent. In the case of *Raj Lukhee Debee v. Gocool Chunder Chowdry*† will be found the following remarks of the Privy Council :— “Their Lordships cannot affirm the proposition that the mere attestation of such an instrument by a relative necessarily imports concurrence. It might no doubt, be shown by other evidence that, when he became an attesting witness, he fully understood what the transaction was, and that he was a concurring party to it; but from the mere subscription of his name that inference does not necessarily arise.”

SUITS BY REVERSIONERS.

The Courts of this country, and also the Privy Council, have held,‡ from a long time, that the reversionary heirs, though their interest is only contingent, have a right to maintain a suit to restrain waste by the widow. The reversioners may, in a suit against the alienee, obtain a declaration that the alienation was without legal necessity, and, therefore, void beyond the widow's life-time.§ When the suit is brought after the widow's death, it takes the form of a prayer for declaration and for possession.

The suit for a declaration that the widow's alienation was invalid, must be brought by the *next* reversioner.

A suit by the *second* reversioner during the life-time of the first reversioner will not lie.|| A petition of disclaimer filed by the

* *Ranjetram Koolal v. Mahomed Waris*, 21 W. R., 49; See also *Cally Chand Dutt v. John Moore*, 1-Fulton, p. 73.

† 12 W. R., 47 P. C. R.

‡ *Ujjalmoni Dosee v. Sagormoni Dosee*, 1 Taylor and Bell, p. 370; *Haridas Dutt v. Rangumoni Dosee*, Vyavastha Darpana, Eng. Ed., p. 124; *Rajlukhee Debee v. Gocul Chunder*, 13 Moore's I. A., 209, 224.

§ Sec. 42, Act I. of 1877, ill. (e)

|| *Ramdhone Buksi v. Punchanun Bose*, S. D. Dec. for 1853, p. 641; *Jadoomoni Debee v. Saroda Prosonno Mukerjee*, 1 Boulnois, Rep., p. 120; *Gogun Chunder Sen v. Joydurga*, S. D. A. Decisions for 1859, p. 620.

immediate reversioner in the suit brought by the *second* reversioner will render the suit by the latter maintainable.*

When the widow has sold, and the whole of the consideration-money was appropriated to the payment of necessary expenses, the sale will be *valid* as against the reversioner. But when the alienation was not necessary, and the consideration was appropriated by the widow to her own use, the sale is *invalid*, and the reversioner will be entitled to have the sale set aside without being required to refund the purchase money. If, however, the sale was partly *necessary* and partly *unnecessary*, it will be set aside only when the reversioner agrees to refund† that portion of the purchase-money which was appropriated to the necessary expenses of the widow. The reversioner must also pay reasonable interest to the purchaser upon the said sum, and the purchaser must account to the reversioner the rents and profits of the property during the time that it was in his possession, both the interest and the account of rents and profits to run from the date of the widow's death.‡ Such a principle is perfectly equitable ; the reversioner's rights are protected, and the purchaser is not unnecessarily endamaged.

If the widow sold for legal necessity when the money could have been raised by a mortgage, it was *held*,§ that the reversioner cannot set aside the sale without placing the purchaser in the same position as that in which he would have been if the widow had mortgaged instead of selling. In the same case, PEACOCK, C. J., expressed a doubt whether such a sale could at all be set aside. He thought that, if the widow elected to sell when it would be more beneficial to mortgage, the sale could not be set aside as against the purchaser, if the widow and the purchaser are both acting honestly ; and the reason assigned for this conclusion is, that the interest of the money raised by the mortgage must be paid out of the estate, and thus the income of the widow would necessarily, be reduced for the benefit of the reversionary heirs.

* Rojonikant Mitter v. Prem Chund Bose, Marshall, 241.

† Phool Chund Lall v. Rughoobun Sahye, 9 W. R., 108.

‡ Motteeram Kumar v. Gopal Sahoo, 20. W. R., 187.

§ Phool Chand Lall v. Rughoobun Sahye, 9 W. R., 108.

If there is a mortgage on the property by the last owner at the time when the widow alienates the property, the reversioner can recover the property from the hands of the purchaser only by paying the amount of the money due on the mortgage.*

There might be circumstances under which the reversioner will be justified in suing to *remove* the widow from possession and the Courts will be justified in granting such a relief. A Court will not be justified in removing the widow from possession of the estate when she is only guilty of an alienation in excess of her powers as a Hindu widow—an alienation which is only binding during the widow's life-time, but which is not binding on the reversioners.† To justify the Court in adopting this extraordinary remedy, there must be, on the part of the widow, something more than a mere alienation—some distinct act of waste—or some positive act of fraud, to injure the interest of the reversioners, must be made out. For instance, if the widow attempted to sell the property, alleging a debt of her husband which she could not otherwise pay, and it appeared that this representation of the widow was false, that there was no debt of her deceased husband to pay, and that this was a mere pretence for alienating the property from the reversioners,—in such a case the widow will be removed from possession. It was clearly a fraudulent and collusive attempt on the part of the widow to create evidence which, if true, would be binding on the reversioners.‡

If the first reversioner does not sue, the second has a right to maintain the suit, on showing that the first reversioner is implicated in the alleged fraud or waste.§

The removal of the widow from possession of the estate does not deprive her of the substantial rights of property. Beyond being deprived of possession, she is not deprived of any of the other advantages of property. She continues proprietor as before ; and the Court

* Moulvie Mohamed Shumshool Hooda v. Shewakram, *alias* Roy Doorga Persud, 22 W. R., 409.

† Pranpütty Kooer v. Futtah Bahadur, 2 Hay's Rep., 608 ; Brindu Chowdrain v. Peary Lal Chowdry, 9 W. R., 46.

‡ Moonshee Casimuddeen v. Ram Dass Gossain, 2 W. R., 170 ; Shama Sundry Chowdrain v. Jummoona Chowdrain, 24 W. R., 86 ; Radha Mohun Dhur v. Ram Dass Dey, 3 B. L. R. 362 ; Gunesh Dutt v. Musst. Lall Mutee Kooer, 17 W. R., 11.

§ Kooer Golab Sing v. Rao Kureem Sing, 14 Moore's I. A., 193.

appoints some person (usually the next reversioner) as manager or receiver to take charge of the property and to account for the rents and profits of the same to the Court, which it holds for the benefit of the widow, and makes over to her periodically.*

Under the old Civil Procedure Code (Act VIII of 1859) it was held that a reversioner's interest was not saleable in execution† of a decree. The present Code of Civil Procedure (Act X. of 1877, sec. 266, clk.) has expressly provided that such rights are not saleable in execution.

If the reversionary heir, however, voluntarily sells his reversionary right, a Court of Equity will compel him to fulfil his contract on his succeeding to the estate.‡

MAINTENANCE OF THE WIDOW.

The widow, when she is not an heiress, is entitled to maintenance according to all the authorities ; and it is to be provided her by those persons who have inherited the property which belonged to her late husband. The obligation to maintain the widow is, therefore, not a personal one ; it is a sort of a charge upon the property of her husband in the hands of the heir.§ This, however, does not preclude the widow from obtaining a personal decree on account of her maintenance against the person who is bound to provide her with it.|| A decree for maintenance is not generally a personal decree against the defendant, but is a decree against him, so far as he is in possession of the assets belonging to the widow's husband, and for that reason liable to satisfy the decree for maintenance.¶ Therefore, a suit brought by the widow against her husband's brother or other relatives, for maintenance, must be dismissed, if it is shown that the defendant inherited

* *Mussamut Moharancee v. Nudu Lall Misser*, 10 W. R., 73.

† *Koraj Koonwar v. Komul Koonwar*, 6 W. R., 34 ; *Ram Chundro Tantrodoss v. Dhurmo Narain Chuckerbutty*, 15 W. R., 17, F. B., *Bhoobun Mohun Banerjee v. Thacoor Dass Biswas*, 2 Indian Jurist N. S., 277.

‡ *Per PHEAR*, J. in *Ram Chundro Tantrodoss v. Dhurmo Narain Chuckerbutty*, 15 W. R., 17, F. B.

§ *Bhoirub Chunder Ghose v. Nobo Chunder Goocho*, 5 W. R., 111, C. R.

|| *Baijun Dobey v. Brij Bhookun Lall*, 24 W. R., 306.

¶ *Tarunginee Dossee v. Chowdry Dwarka Nath Musant*, 20 W. R., 196.

no property from the husband of the widow.* The widow of a deceased member of a joint family is entitled to claim maintenance from her father-in-law and her brothers-in-law,† as her husband's interest in the family property passes to them. The maintenance of a son's widow has been held by the Calcutta High Court to be a mere moral duty on the part of her father-in-law, which in case of a breach, is not enforceable in a Court of law.‡

If the heir had taken the property of the widow's husband, he is primarily responsible, both in person and property, for the widow's maintenance. He cannot resist the widow's claim by saying, that the property out of which the widow is entitled to be maintained is no longer in his hands, but that it has been transferred and passed into some other hands. On this point it was observed by the High Court of the North-Western Provinces that "the heir who takes and becomes possessed of the estate of the deceased, must be held to continue to be primarily responsible, both in person and property, for the maintenance of the widow, even though he should have fraudulently transferred that estate, or otherwise have improperly wasted it; and the widow is bound to look to the heir for her maintenance, and to claim it from him primarily, rather than from the estate transferred or wasted which may, nevertheless, resort answerable to her claim.§

The widow, who is guilty of unchastity, is not entitled to claim maintenance from the heirs of her husband.|| If she is guilty of unchastity during her husband's lifetime, she cannot claim maintenance after his death. If the widow is guilty of improper conduct, such as having eloped from the residence of her husband, she forfeits her right to future maintenance from the heirs of her husband.¶

* Khetramoni Dosee v. Kasi Nath Doss, 10 W. R., 89, F. B; see Sabitra Bai v. Lukshmi Bai, I. L. R., 2 Bom., 573; Mad. Dec. for 1859, pp. 5, 265, 272; Roma Bai v. Trimbuick Gonesh, 9 Bom. H. C., 283.

† Must. Lalti Kuar v. Gunga Bishun, 7, N.-W. P., H. C., 261.

‡ Khetra Moni Doss v. Kashee Nath Doss, 10 W. R., 89, F. B.

§ Ram Chunder Toiaun v. Mutt. Jasoda Kuar, 2, N.-W. R., Rep., 134,

|| 2 Macnaghten, 112.

¶ Ranee Basunt Kumaree v. Ranee Kumul Kumaree, 7 Sel. Rep., 168.

If the widow who has been receiving maintenance from the heirs of her husband becomes unchaste, it has been held that she will be deprived of her maintenance.*

The Bombay High Court has ruled, that a widow getting maintenance under a decree will not be deprived of it by the fact of subsequent incontinence.†

The widow's right of maintenance cannot be defeated by anything short of gross misconduct on her part, or a testamentary or a nuptial gift on the part of the husband. The husband cannot defeat her right of maintenance by an *express* clause in the will. The widow's right of maintenance arises by marriage, it is not a matter of contract ;‡ it exists during the husband's lifetime, and continues after his death. It is a legal obligation attaching upon himself personally, and upon his property after his death. He cannot free himself of this obligation during his life-time, nor can his heir after his death, so far as he inherits his property ; and a devise of the property will not authorise the devisee to hold the property free from the widow's claim to maintenance, when neither the testator nor his heir could have resisted such a claim. It has been held, that, in Bengal, a widow has no indefeasible vested right in the property left by her husband, though she has, by virtue of her marriage, a right, if all the property be willed away, to maintenance.§

The obligation of the widow to reside with her husband's family is now treated as a mere moral one, and the infringement of the same by the widow does not carry with it any penalty.||

Where a person purchases property without notice of the existence of the widow's right of maintenance as a *charge* upon the said property, it has been held, that the property in his hands will not be liable for such maintenance.¶ The amount of maintenance must be determined

* *Kerry Kolitnee v. Monceram Kolita*, 19 W. R., 405, *re Jackson, J.*

+ *Honama v. Turnamabhat*, I. L. R., 1 Boni, 559.

‡ *Sidlingapa v. Sidava*, I. L. R., 2 Boni, 624.

§ *Bhubunmoyee v. Ramkisore*, S. D. D. of 1860, p. 489. See also *Sonatun Bysack v. S. M. Juggut Sundaree Dossee*, 8 Moore's I. A., 66.

|| *Aholya Bai Debia v. Lukhee Monoo Debia*, 6 W. R., 37.

¶ *Suniti Bhogobati Dosi v. Kanailal Mitter*, 8 B. L. R., 225.

beforehand, either by decree or by contract, and made a charge upon the property conveyed, before the same in the hands of a *bona fide* purchaser for consideration can be made liable for it.*

Where the widow has obtained a decree fixing a certain sum as her maintenance, to be obtained out of certain property, it was held that she has a right to have this amount declared as a charge upon the property into whossoever hands it may come.†

Where property was confiscated by the Crown on account of rebellion, it was held that the widow of the former owner, whose sons, the then owners of the property, were guilty of rebellion, was entitled to maintenance from Government out of the property which had been confiscated.‡

The Bombay High Court has ruled that, to make the purchaser liable for the widow's maintenance, it must be shown that he was a party to the fraud which the heir was practising upon her to deprive her of her maintenance.§

The amount of maintenance to which the widow is entitled is generally a question of fact. The amount of the family property is always an element in the consideration of this question ; as also the number of other persons whose wants and necessaries are to be met out of the family property and other obligations that there are upon the said property.

The amount of maintenance which is awarded to a widow may sometimes be varied ; as, where the family property is reduced subsequent to the date of the award of maintenance, the defendant may apply to the Court to have the amount of maintenance reduced on that ground.|| On the same principle, the widow may apply for the enhancement¶ of the amount if the assets increased.

Where a Hindu widow has received certain property as and for her maintenance, she cannot, when she has exhausted it, enforce from

* Jugger Nath Samunt v. Maharanee Adhiranee Narain Koomari, 20 W. R., 126.

† Koomari Debia v. Roy Lutchmeeput Sing, 23 W. R., 33.

‡ Mussamut Golab Koowar v. The Collector of Benaras, 4 Moore's I. A., 246.

§ Lukshman Ram Chundra v. Satyabhama Bai, I. L. R., 2 Bom., 494, 524.

|| Ruka Bai v. Gunda Bai, I. L. R., 1 All, 594.

¶ Sreeram Bhattacharjee v. Puddomookhee Debee, 9 W. R., 152.

the relatives of her husband, or from the family estate, a further allotment or a money allowance for maintenance.*

How far the widow is entitled to claim arrears of maintenance in a suit declaring her right to it, has sometimes been raised. It is not necessary that there should be a demand and refusal to entitle her to claim arrears. Without a previous demand and refusal, she will, nevertheless, be entitled to it. A demand is not necessary to create her right to it.†

There may be cases in which the circumstances are such that her claim to arrears will be disallowed. Long neglect on her part to claim the same, and the fact of her being maintained by her parents or other near relatives, without her being obliged to incur any expense on account of it, will probably, be grounds on which a Court will be justified in disallowing her claim to arrears of maintenance.‡

In addition to her right of maintenance, the widow is entitled to reside in the family dwelling-house of her husband. The son or other heir cannot turn her out of the same without providing for her a suitable residence elsewhere : nor is the purchaser from the heir entitled to turn her out of the family residence.§ The same principle was maintained by the Allahabad High Court, where it was held,|| that the purchaser from the nephew was not entitled to evict the widow of his vendor's uncle from the dwelling-house, in a part of which she was living from the time of her husband.¶

The widow is entitled to a share of the family property, in case of a partition, among her sons or other heirs, of the same. The share which the widow gets is equal to that of each of her sons.** She obtains it in lieu of her maintenance.

* *Sabitri Bai v. Luxmi Bai*, I. L. R., 2 Bom, 573.

+ *Jivi v. Ramji*, I. L. R., 3. Bom, 207 ; *Sukvar Bai v. Bhovanji*, 1 Bom. H. C. Rep., 194 ; *Vencapadya v. Kavari Hengasee*, 2 Mad. H. C. Rep., 56.

‡ *Ahollyya Bai Debia v. Lukhee Monee Debia*, 6 W. R., 37.

§ *Mungala Delbi v. Dinonath Bose*, 12 W. R., 35, A. O. J.

|| *Ganri v. Chandra Moni*, I. L. R., 1 All., 262.

¶ *Bhigham Dass v. Pura*, I. L. R., 2 All., 141.

** *Dayabhaga*, Chap. III, Sec. II, para. 29 ; *Pran Kissen Mitter v. Mutto Sundry Dossee, Fulton*, 389.

The *mother* is entitled to a share, not the *step-mother*.* Therefore, if the step-mother is childless, she will only get a maintenance. The share of the mother is contributed by *her sons* from their portion of the inheritance.† Where a Hindu died, leaving six sons, one of them was by his first wife, who was dead; the remaining five sons by his second wife, who was living; and a third wife, who was childless, was living. On a partition among the six sons, it was ordered that the son whose mother was dead shall get one-sixth of the estate, the remaining five-sixths to be divided into six equal parts, of which the five sons and their mother shall get one share each. But it was further ordered, that before any partition he made, the Master do enquire and report what would be a requisite sum for the purpose of securing a suitable maintenance for the childless widow, and that the said sum be, in the first instance, set apart for the purpose.‡ Where property was divided between four sons, three of them the sons of one wife, and the fourth the son of the second wife, it was held, that the property will be divided into four equal parts, of which one share will go to the only son of the second wife, who will get no share, but will be entitled only to maintenance from her son. The remaining three shares to be again divided into four equal parts, of which the three sons and their mother shall take one share each.§

In the same way, the grandmother is entitled to a share when the partition is made between her *sons* and *grandsons*, but the right of the great grand-mother to a share is nowhere admitted||, though she is declared entitled to maintenance.

THE RE-MARRIAGE OF WIDOWS.

Act XV. of 1856 of the Governor-General in Council provides for the re-marriage of Hindu widows and declares that the issue of such marriage shall be legitimate. It also provides that, rights of inheritance or of maintenance, which the female heir possesses in the property

* Dayabhaga, Chap. III, Sec. II, para. 30.

† Issur Chunder Corformah v. Gobind Chunder Corformah, Macn. Cons. of Hin. Law, 74

‡ Seeb Chunder Bose v. Gooroo Prosaud Bose, Macn. Cons. of Hin. Law. 62.

§ Srimati Jeomony Dasree v. Attaram Ghose, Macn. Cons. of Hin. Law., 64.

|| Macn. Cons. of Hin. Law., 28; See also Gooroo Prosaud Bose v. Shub Chunder Bose, Macn. Cons. of Hin. Law, 29.

of the late owner at the time of her re-marriage, shall cease and determine upon her re-marriage ; but a right of property conferred by will, when larger than the widow's estate under the Hindu law, shall not so determine.* She is not to be deprived of any rights *accruing after* her re-marriage. Where, therefore, the son died *after* his mother had re-married, she was held entitled to succeed him as his heir.† The Act also provides for the guardianship‡ of the children of the deceased husband on re-marriage of his widow. Few marriages among the high caste Hindus have taken place in accordance with the provisions of the Act. But there is a custom, only among the very lowest classes of Hindus, of re-marrying their widows. In the Presidencies other than Bengal, these marriages have obtained a recognised footing. Such marriages are called *Pat* among the Maharattas, and *Natra* in Guzerat.§ This kind of union is also allowed to women who are *wives*, and who are separated from their husbands by a sort of divorce, which is allowed under certain specified circumstances ; as for instance, when the husband is proved to be impotent, or the parties continually quarrel, or where the marriage was irregularly concluded, or where by mutual consent the husband breaks his wife's neck ornament, and gives her a *char chittee*.||

Where a widow enters into this form of a *Pat* marriage, she is obliged to give up all she inherited from her first husband to her husband's relations ; she is allowed to retain only what was given to her by her parents.¶ This is in the Bombay Presidency ; and the same principle has been applied by the Madras High Court to the case of the second marriage of a Maraver woman.** The custody of the children, except infants, also belongs to the representatives of the first husband.†† The children of *Pat* widows are never considered illegitimate. They are legitimate equally with those by their first marriage.

* See II. 5 of Act XV of 1856.

† Okhorah Soot v. Bheden Barianee, 10. W. R., 34 ; 11. W. R., 82 ; See also Musst. Rupan v. Hukmi Singh, Punjab Customs, 99.

‡ Sec. III.

§ Steele, p. 26, 168 ; See Rahi v. Gobinda Valad Teja, I. L. R., 1 Bom, 97.

|| Steele, p. 169.

¶ Steele, p. 169 ; West and Bühlér, p. 99 ; Hurkoonwar v. Rutton Baee, 1 Borradale, 431 ; Treekumjee v. Mt. Laro, 2 Borradale, 361.

** Murugayi v. Viromakali, I. L. R., 1 Mad. 226.

†† Steele, p. 169.

130.—ss. 294, 295, 296, & 297—*Order of discharge under s. 215—Revival of Proceedings.*] An order of a district Magistrate, directing the revival of certain criminal proceedings against the petitioners who had been discharged under s. 215 of the Criminal Procedure Code by a Subordinate Magistrate after evidence had been gone into, quashed as illegal and *ultra vires*.

As the case was one of improper discharge, and came before the Magistrate under s. 295 of the Criminal Procedure Code, the proper and only course for him was to report it for orders to the High Court, which, if of opinion that the accused were improperly discharged, might, under s. 297, have directed a re-trial.

The case of *Sidya bin Satya* differed from. *In the matter of the petition of Mohesh Mistree.* 1 Calc. 282.

131.—s. 296—See No. 513.

132.—s. 297—See No. 365.

133.—s. 314—See No. 595. (b.)

134.—s. 346—See No. 262.

135.—s. 390—See No. 213.

136.—s. 454—See No. 595. (a.)

137.—ss. 467, 468, 469, 471—*Prosecution—Procedure.*]

S. 471, Act X. of 1872, does not deprive the Court which possesses the power of trying an offence mentioned in ss. 467, 468, and 469, of the power of trying it when committed before itself.—*The Queen v. Gur Baksh* 1 All. 193.

138.—ss. 468, 469—See No. 593.

139.—ss. 468, 471, 472, 473.—*Offence against Public Justice—Offence in contempt of Court—Prosecution—Procedure.*] An offence against public justice is not an offence in contempt of Court within the meaning of s. 473, Act X. of 1872.

But notwithstanding this, the Court, Civil or Criminal, which is of opinion that there is sufficient ground for enquiring into a charge mentioned in ss. 467, 468, 469, Act X. of 1872, may not, except as is provided in s. 472, try the accused person itself for the offence charged.

The case of *Sufatoolah* (22 W. R., Cr., 49) followed.

The Queen v. Kultaran Singh.—1 All. 129.

140.—Offence against Public Justice.—Offence in contempt of Court—Prosecution—Procedure.] An offence against public justice is not an offence in contempt of Court within the meaning of s. 473, Act X. of 1872.

The Court, Civil or Criminal, which is of opinion that there is sufficient ground for inquiring into a charge mentioned in ss. 467, 468, 469, Act X. of 1872, is not precluded by the provisions of s. 471 from trying the accused person itself for the offence charged.—*The Queen v. Jacat Mal.* 1 All. 162.

141.—s. 471—Act XXIII. of 1861, s. 16—Order sending case to Magistrate for enquiring into offence of giving false evidence—Preliminary enquiry—Vagueness of charge.] Although s. 16 of Act XXIII. of 1861 gives Civil Courts powers similar to those conferred on Civil and Criminal Courts alike by s. 471 of the Criminal Procedure Code, the whole law as to the procedure in cases within those sections is now embodied in s. 471 of the Criminal Procedure Code.

In a suit brought to recover possession of certain property, the Judge decided one of the issues raised in the plaintiff's favour, but on the important issue as to whether the plaintiff ever had possession, he found for the defendant. The plaintiff was not examined, but on the issue as to possession he called two witnesses. The Judge disbelieved their statements, and considering that the plaintiff had failed to prove his case, he gave judgment for the defendant, without requiring him to give evidence on that issue. In the concluding paragraph of his judgment, the Judge directed the depositions of the two witnesses above referred to, together with the English memoranda of their evidence, to be sent to the Magistrate, with a view to his enquiring whether or not they had voluntarily given false evidence in a judicial proceeding : and he further directed the Magistrate to enquire whether or not the plaintiff had abetted the offence of giving false evidence, on the ground that as the witnesses were the plaintiff's servants he must personally have influenced them, and also to enquire whether the plaint which the plaintiff had attested contained averments which he knew to be false. On a motion to quash this order, held, that, under the Criminal Procedure Code, the Judge has no power to send

a case to a Magistrate except when, after having made such preliminary enquiry as may be necessary, he is of opinion that there is sufficient ground (*i. e.*, ground of a nature higher than mere surmise or suspicion) for directing judicial enquiry into the matter of a specific charge, and that the Judge is bound to indicate the particular statements or averments in respect of which he considers that there is ground for a charge into which the Magistrate ought to enquire, and that the order was bad because the Judge had made no preliminary enquiry and because it was too vague and general in its character. *The Queen v. Baijoo Lall.—In the matter of the petition of Baijoo Lall.* 1 Cale. 450.

142.—s. 521—See No. 542.

143.—XVIII. of 1872, s. 9—See No. 229.

144.—XVIII. of 1873—See No. 99.

145.—s. 93, cl. (a)—See No. 421.

146.—cl. (h)—See No. 408.

147.—XIX. of 1873, s. 241, cl. (i)—See No. 422.

148.—III. of 1874, ss. 7 and 8—See No. 394.

149.—VI. of 1874.—*Privy Council Appeals Act—Letters Patent, 1862, cl. 39—24 and 25 Vict., c. 104, s. 9—24 and 25 Vict., c. 67 (Indian Council's Act), s. 22—Power of Indian Legislature.*]

The provision in s. 5 of Act VI. of 1874 that where there are concurrent decisions on facts, the case must, in order to give a right of appeal to the Privy Council, involve some substantial question of law, is not *ultra vires* of the power of the Indian Legislature as being a curtailment of the jurisdiction given to the High Courts by the Letters Patent, 1865, cl. 39.

Cl. 39 of the Letters Patent of 1865 does not rest for its authority on the 24 & 25 Vict., c. 104, and was not inserted in pursuance of that Act ; consequently any power which it gives to admit an appeal to the Privy Council from a decision of the High Court on its Appellate Side, is not one of the powers which the High Court is, by the first part of s. 9 of 24 and 25 Vict., c. 104, commanded to exercise.

S. 22 of 24 & 25 Vict., c. 67, must be read with ss. 9 and 11 of 24 & 25 Vict., c. 104. By the express words of s. 9 all previously existing powers were reserved to the High Court provided the Letters

Patent did not interfere with them, and as to these powers the Governor-General in Council is expressly empowered to legislate. Even if, therefore, the power to admit an appeal to the Privy Council were conferred by the Letters Patent, under the authority of 24 and 25 Vict., c. 104, it was, not being a new power, subject to the legislative control of the Governor-General in Council.

The *ratio decidendi* in *The Queen v. Meares* (14 Beng. L. R., 106) dissented from.

Where there were two concurrent decisions on facts, an application to appeal to the Privy Council was refused, the right of appeal from a decision of the High Court on its Appellate Side, simply on the ground that the subject-matter of the suit was above Rs. 10,000 having been taken away by Act VI of 1874, s. 5.—*In the matter of the petition of Feda Hossein.* [1 Calc. 431]

150.—See No. 183.

151.—ss. 11, 14 and 15—See No. 191.

152.—IX. of 1875, s. 3—*Majority Act—Minor—Guardian ad litem.*] The appointment of a guardian *ad litem* is sufficient to make the minor party subject to s. 3, Act IX. of 1875, and to constitute his period of majority at 21, at any rate so far as relates to the property in suit, notwithstanding that such minor would but for such appointment have attained majority at 18.—*Suttya Ghosal v. Suttyanund Ghosal.* [1 Calc. 388.]

153.—X. of 1875, ss. 32 to 37—*High Court Criminal Procedure Act—Hindu prisoner—Constitution of jury.*] A prisoner not being a European British subject, who is not charged jointly with a European British subject, is not entitled, under the provisions of the High Court Criminal Procedure Act, to be tried by a jury of which at least five persons shall not be Europeans or Americans.—*The Queen v. Lalubhai Gopaldass.* 1 Bom. 232.

154.—s. 147—*High Courts Criminal Procedure Act—Case transferred to High Court—Refund of fine on quashing conviction—Notes of evidence taken by Magistrate.*] The High Court has no power, under s. 147, Act X. of 1875, to order a fine to be refunded on quashing a conviction.

The Court in this instance decided whether the case should be transferred under s. 147 on the notes of the evidence taken by the Magistrate at the trial.—*The Queen, on the prosecution of Mo'ad Ali v. Hadjee Jeebun Bux.* 1 Calc. 354.

155.—*High Courts Criminal Procedure Act—Case transferred to High Court—Notice to prosecutor—Penal Code (Act XLV. of 1860) ss. 292 and 294—Specific charge—Procedure on transfer to High Court.]* In an application for the transfer of a case under s. 147, Act X. of 1875, in which the prisoner has been convicted and is undergoing imprisonment, it is in the discretion of the Court to order, for sufficient *prima facie* cause shewn, that the case be removed, without notice to the Crown.

Semble.—A charge under ss. 292 and 294 of Act XLV. of 1860, should be made specific in regard to the representations and words alleged to have been exhibited and uttered, and to be obscene ; and the Magistrate, in convicting, should in his decision state distinctly what were the particular representations and words which he found on the evidence had been exhibited and uttered, and which he adjudged to be obscene, within the meaning of those sections. Where no such specific decision has been given, the High Court, when the case has been transferred under s. 147, Act X. of 1875, may either try the case *de novo*, or dismiss it on the ground that the Magistrate has come to no finding on which conviction can be sustained.—*The Queen v. Upendronath Doss.* 1 Calc. 356.

156.—XIII. of 1875—See No. 532.

ACTS (OF THE LOCAL GOVERNMENTS.)

157.—Bengal, III. of 1864, s. 33—*Municipal Commissioners—Appeal against Assessment—Jurisdiction of Civil Court.]* A suit to set aside an order made on an appeal under s. 33 of Bengal Act III. of 1864 to the Municipal Commissioners against a rate assessment, and to reduce the tax levied by them under that Act, on the ground that they have tried the appeal in an improper way, and have exceeded their powers and acted contrary to the provisions of the Act, cannot be maintained in the Civil Courts. The decision of the Commissioners in such an appeal is absolutely final.—*Manessur Dass v. The Collector and Municipal Commissioners of Chapra.* 1 Calc., 409.

158.—VIII. of 1869, s. 27—*Limitation—Suit for possession with Mesne Profits—Defendants—Title.*] A suit for possession of certain lands “by establishing the plaintiff’s howla right,” and for mesne profits, brought against the shareholder of the talook in which the lands are situated, a former talookdar, and certain ryots who paid rent to the first defendant, is not a suit to recover the occupancy of the land from which the plaintiff has been illegally ejected by the person entitled to receive the rent, within the meaning of s. 27 of Bengal Act VIII. of 1869, and is not governed by the limitation provided by that section.—*Khajah Ashanoolah v. Ramdhone Bhattacharjee.* 1 Cale. 325.

159.—s. 98—*Suit for value of Crops—Distraint—Jurisdiction—Small Cause Court.*] The plaintiff made a complaint to the Magistrate against the defendant, his landlord, for forcibly carrying away his crops; whereupon the defendant was tried, convicted of theft, and punished. The plaintiff then instituted a suit against the defendant in the Munsif’s Court, apparently under s. 95 of Bengal Act VIII. of 1869, and obtained a decree declaring the distraint to be illegal, and directing the crops to be given up to him. The defendant offered to give up a smaller quantity than was mentioned in the decree. The plaintiff refused to take the same, and brought a suit in the Small Cause Court to recover the value of the quantity he had claimed before the Munsif and something additional. *Held*, that the Small Cause Court had no jurisdiction, and that the suit ought to have been brought under s. 98 of Bengal Act VIII. of 1869.—*Hyder Ali v. Jafar Ali.* 1 Cale. 183.

160.—Madras, VIII. of 1865—Where the parties are bound to exchange written engagements in the shape of pattas and muchalkas, the landholder must, in order to maintain a suit under s. 9 of Madras Act VIII. of 1865 to enforce acceptance of a patta, show that he has tendered a patta in writing. A mere indefinite demand or notice, whether written or unwritten, is not sufficient to sustain such a suit.—*Syaud Chanda Miah Shaib v. Lakshmana Aiyangar.* 1 Mad. 45.

161.—2. *Landholder*] A Zemindar hypothecated certain villages comprised in his Zemindari as security for a debt, at the same time leasing the said villages to the mortgagee at an annual rent, the amount of which was to be, as it fell due, credited in liquidation the of

debt. Held that the plaintiff, who was the assignee of the hypothecation deed and the lease, was not a "Landholder" within the meaning of Madras Act VIII. of 1865.—*Zinulabdin Rowten v. Vijen Viraputren*. 1 Mad. 49.

161 (a)—Bombay, V. of 1862—*Narvadari or Bhagdari village—Partition among Narvadars or Bhagdars.*] There is nothing in Bombay Act V. of 1862 which debars a Civil Court from making a decree for the partition of Narvadari land among the Bhagdars, even though such partition may cause a further division of recognized sub-divisions of Bhags.—*Veribhai v. Raghulbai*. 1 Bom. 225.

162.—IX. of 1863, s. 2—*Cotton—Adulteration—Possession.*] Possession of adulterated cotton, even though accompanied by a knowledge that the cotton is adulterated, is not sufficient to sustain a conviction of fraudulent adulteration or deterioration of cotton under the Cotton Frauds Act (Bombay Act IX. of 1863). No criminality attaches to such possession till the cotton is actually offered for sale or compression.—*The Queen v. Hanmant Garda*. 1 Bom. 228.

163.—I. of 1865, s. 2, cl. j, k, l. and s. 48.—See No. 430.

164.—I. of 1873—*Injunction—Libel-Ultra Vires.*] —See No. 404.

165. Administrator—See No. 391.

166. Adoption—*Mother's sister's son—Sudras.*] Adoption of the mother's sister's son is valid among Sudras. The rule prohibiting the adoption of one with whose mother, in her maiden state, the adopter could not have legally intermarried, is not binding on Sudras.—*Chirna Nagayya v. Pedda Nagayya*. 1 Mad. 62.

167.—*Hindu widow—Undivided family—Authority to adopt.*] According to law prevalent in the Dravida country, a Hindu widow, without having her husband's express permission, may, if duly authorized by his kindred, adopt a son to him.

* *The Collector of Madura v. Mootoo Ramalinga Sathupathy* (12 Moore's I. A., 397) referred to and approved.

Sembie, in the case of an undivided family the requisite authority to adopt must be sought within that family, and cannot be given by a single separated and remote kinsman.

Speculations founded on the assumption that the law of adoption now prevalent in Madras is a substitute for the old and obsolete prac-

tiee of raising up seed to a husband by actual procreation are inadmissible as a ground of judicial decision.—*Sri Virada Pratapa Baghunada Deo v. Sri Brozo Kishoro Patta Deo.* 1 Mad. 69.

168.——See Nos. 384 and 631.

169.——Suit to set aside—*Infant marriage—Presumption as to age—Power of minor to give permission to adopt—Regs. X. of 1793, s. 33 and XXVI. of 1793, s. 2—Minor under Court of Wards—Onus probandi—Estoppel.]* The foundation for infant marriages among Hindus is the religious obligation which is supposed to lie on parents to provide for a daughter, so soon as she is *matura viro*, a husband capable of procreating children ; the custom being that, when that period arrives, the infant wife permanently quits her father's house, to which she had returned after the celebration of the marriage ceremony, for that of her husband. The presumption, therefore, is that the husband, when called upon to receive his wife for permanent cohabitation, has attained the full age of adolescence and also the age which the law fixes as that of discretion.

According to the Hindu law prevalent in Bengal, a lad of the age of fifteen is regarded as having attained the age of discretion, and as competent to adopt, or to give authority to adopt, a son.

Semblé.—The operation of s. 33, Reg. X. of 1793, which, read together with s. 2, Reg. XXVI. of 1793, prohibits a landholder under the age of eighteen from making an adoption without the consent of the Court of Wards, is confined to persons who are under the guardianship of the Court of Wards.

Quære.—Whether a decree in favour of the adoption passed in a suit by a reversioner to set aside an adoption is binding on any reversioner except the plaintiff ; and whether a decision in such a suit adverse to the adoption would bind the adopted son as between himself and any other than the plaintiff.—*Jumoona Dassya v. Bamasondari Dassya.* 1 Calc. 289.

170. Advocate, admission and powers of.—See No. 581.

171. Advocate-General, case certified by.—See No. 111.

172. Affidavit.—See No. 515.

173. Agent.—1 Bom. 87.—See No. 26.

174. Agreement.—See No. 569.

175. —— To refer to arbitration.—1 Calc. 466.—See Act IX. of 1872, s. 28.

176. —— Revocation of.—1 Cal. 42.—See Act IX. of 1872, s. 28, Exception 1.

177. —— Unconscionable.—See No. 461.

178. Amendment of Decree.—See No. 512.

179. Ancestral Estate.—See Nos. 383 & 647.

180. —— Immoveable property.—See Nos. 388 and 389.

181. Annuity.—See No. 84.

182. Appeal—*Act XXVII. of 1860.—Deposit of security by person entitled to a Certificate.*] No appeal lies under Act XXVII. of 1860 on a question of the deposit of security by a person who has been declared entitled to a certificate under the Act.—*Monmohinse Dassee v. Khetter Gopal Dey.* 1 Calc. 127.

183. —— *Letters Patent, 1865, cl. 15—Act VI. of 1874—Order granting Appeal to Privy Council.*] Under cl. 15 of the Letters Patent, no appeal lies to the High Court from an order of the Judge in the Privy Council Department, granting a certificate that a case is a fit case for appeal to Her Majesty in Council.—*Mowla Buksh v. Kishen Pertab Sahi.* 1 Calc. 102.

184. —— *Reg. VIII. of 1819, s. 6—24 and 25 Vict. c. 104, s. 15.*] There is no appeal from an order made by the Civil Court under s. 6 of Regulation VIII. of 1819.

Per BIRCH, J. — A party who was preferred an appeal to the High Court when the law gave him no right of appeal, is not entitled upon the hearing to ask the Court to treat it as an application for the exercise of its extraordinary jurisdiction under s. 15 of 24 & 25 Vict. c. 104.—*In the matter of the Petition of Soorja Kant Acharj Chowdry.* 1 Calc. 383.

185. —— *Act VIII. of 1859, s. 254—Sale in execution—Defaulting Purchaser—High Court—Appellate Civil Jurisdiction—Division Court—Letters Patent N.-W. P., cl. 10.*] An appeal lies from an order passed on an application under s. 254, Act VIII. of 1859, to make a defaulting purchaser liable for the loss occasioned by a re-sale.

Held, (Spankie, J., dissenting,) that the appeal given to the full Court, under cl. 10, Letters Patent, is not confined to the point on which the Judges of the Division Court differ.—*Ram Dial v. Ram Das.* 1 All. 181.

186.—*Decree-Judgment.*] The plaintiffs in this suit claimed, as the heirs of G possession from the defendant of certain lands which G had mortgaged to the defendant, alleging that the mortgage-debt had been satisfied from the usufruct. The defendants denied the title of the plaintiffs to redeem, ascerting also that the mortgage-debt had not been satisfied. The court of first instance held that the plaintiffs were entitled to redeem, but dismissed the suit on the ground that the mortgage-debt had not been satisfied. *Held*, that the defendants were entitled to appeal, the case of *Pan Komer v. Bhugwunt Kooer*. (H. C. Rep. N.-W. P., 1874, p. 19) not being applicable to this case.—*Ram Gholam v. Sheo Tukal.* 1 All. 266.

See— Nos. 33, 44, 46, 96, 106, 514, 516, & 595 (b.)

187.—Appeal admission of, after the period of limitation.—*Act IX. of 1871, ss. 4 and 5, b—single Judge and Division Court—Jurisdiction.*) *Held*, that the order admitting an appeal after time, made *ex parte* by a single Judge of the High Court sitting to receive applications for the admission of appeals, under a rule of the Court made in pursuance of 24 & 25 Vict., c. 104, s. 13 and the Letters Patent of the Court, (N.-W. P.), s. 27, was liable to be impugned and set aside at the hearing by the Division Court before which it was brought for hearing, on the ground that the reasons assigned for admitting it were erroneous or inadequate.—*Dubey Shhai v. Goneshi Lal.* 1 All. 34.

188.—Against assessment—See No. 157.

189.—Arrest pending—See No. 128..

190.—From judgment of division Court—See No. 443.

191.—To Privy Council.—1.—*Dismissal of appeal for default in deposit of security and in transcribing record—Act VI. of 1874, ss. 11, 14 & 15.*) On an application to stay proceedings in an appeal to the Privy Council, which had been presented on 2nd July 1874 from a decision of the High Court on its Original Side, it appeared that no deposit had been made by the appellant to defray

the costs of transcribing, &c., as provided by s. 11, Act VI. of 1874; that no steps had been taken to prosecute the appeal; and that no security had been deposited for the costs of the respondent since the petition appeal was presented. The Court granted a rule calling on the appellant to show cause why the proceedings on appeal should not be stayed, and on his not appearing to show cause, ordered that the appeal should be struck off the file.—*Thakoor Kapilnath Shai v. The Government.* 1 Calc. 142.

192.—2.—*Questions of law referred to a Full Bench.)* Were a Division Bench of a High Court, refers a question of law for the consideration of the Full Bench, and the answer of the Full Bench is not framed as a decree or as an interlocutory order, and an appeal is brought to Her Majesty in Council, it is open to the respondent, without a crossappeal, to object to the correctness of the answer given by the Full Bench on the question of law referred.—*Phoolbas Koonwus v. Lalla Jogeshur Sahoy.* 1 Calc. 226.

193.—When instituted—*Act VIII. of 1859, s. 336—Memorandum of appeal—Limitation.)* Where, under the provisions of s. 336, Act VIII of 1859, a memorandum of appeal is returned for the purpose of being corrected the appellate Court should specify a time for such correction.

Where an appellant presented an appeal, within the period of limitation prescribed therefore, and the Appellate Court returned the memorandum of appeal for correction without specifying a time for such correction, the appeal again presented some days after the period of limitation was presented within time, the date of its presentation being the date it was first presented.—*Jagan Nath v. Lalman.* 1 All. 260.

194.—Appellate Civil Jurisdiction of High Court.—See No. 185 & 443.

195.—Court—See No. 129.

196.—Application—See Act IX. of 1871, Sched. II, cl., 85. (I Bom. 253.

197.—cls. 166, 167. 1 Bom. 19.

198. Appropriation 1 Bom. 1.—See Account.

199. Arbitration 1 All. 156—See Act VIII. of 1859, s. 327.

200. ——Agreement to refer to—See Contract Act, s. 28
1 Calc. 466.
201. ——Exception 1. 1 Calc. 42.
202. Arrest pending appeal. 1 Calc. 281—See Act X. of 1872,
s. 272.
203. ——Privilege from 1 Calc. 78—See No. 606.
204. Assessment, appeal against 1 Calc. 409, Act—See Bengal,
III. of 1864, s. 33.
205. Attachment—See No. 283.
206. Attachment of property in mofussil—See No. 554.
207. Attestation—See No. 659.
208. Attorney, admission and powers of—See No. 581.
209. ——And client.—1 Bom. 223—See Act IX. of 1871,
Sched. 11, cl. 85.
210. Auction-purchaser—See Nos. 258, 570 and 587. (b)
211. Avoidance of contract—See No. 327.
212. Award, 1 All. 156—See Act VIII. of 1859, s. 327.
213. Bail.—*Act X. of 1872, s. 390—Convicted person—Sessions Court.*] The Court of Session has no power, under s. 390, Act X. of 1872, to admit a convicted person to bail, a *convicted person* not being an *accused person* within the meaning of that section.—*The Queen v. Thakur Parshad.* 1 All. 151.
214. Bengal Act—See Acts, Bengal.
215. ——Regulations—See Regulations, Bengal.
216. Betrothal, ceremonies of 1 Calc. 74—See Act VIII. of 1859, ss. 92 and 93.
217. Bhagdari village. 1 Bom. 225—See Act, Bombay, V. of 1862.
218. Bhaoli 1 All. 217—See Jurisdiction, 4.
219. Bill of costs. 1 Bom. 253—See Act IX. of 1871, Sched. II., cl. 85.
220. Blindness. 1 Bom. 177—See Hindu Law, 14.
221. Bombay Act—See Acts, Bombay.

222. —— **Regulations**—See **Regulations, Bombay.**
 223. **Bonâ fide belief.** 1 Mad. 89—See **Collector of Sea Customs.**
 224. **Bonâ fides**—See **Hindu Will,** 1 Bom. 269—See **Vendor and Purchaser.** 1 Bom. 237.

225. **Bond**—*Error in account*—*Waiver*—*Estoppey*—*Indorsement*—*Receipt*—*Evidence of payment.*] Where the defendant executed to the plaintiff a bond for the payment of the balance found to be due from the defendant to the plaintiff upon an adjustment of the account of their mutual dealings, which bond contained the following stipulation : “I shall pay the money after causing the payment to be entered on the back of this bond or after taking a receipt for the same. I shall not lay any claim to any payment made except in this way ; ”

Held that, though the defendant at the time of the adjustment disputed the correctness of the account, yet, by having executed the bond and made payments under it, he must be held to have waived his objection, and in a suit on the bond could not be permitted to re-open the question of the correctness of the balance, though he might possibly have been allowed to do so had he alleged that he had discovered errors in the account after the execution of the bond, and had he specified some of the alleged errors. *Held*, also, that the stipulation in the bond could not be permitted to control Courts of Justice as to the evidence which, keeping within the rules of the general law of evidence in this country, they may admit of payments ; and the Anglo-Indian law of evidence not excluding oral evidence of payments, it would be against good conscience and the policy of the law to reject it, though the absence of indorsement is a circumstance of some importance, which ought not to be overlooked, but is by no means conclusive.

Brahma Taitak v. Yusuntum Chinna, (Mad. S. D. A. Rep. for 1855, pp. 49 and 50) impeached ; *Sashachellum Chetty v. Govindappa* (5 Mad. H. C. Rep. 451), *Kashinath Balal Oka v. Narria Jan* (Bom. Sp. Ap. 438 of 1872), and *Nugur Mull v. Azeemullah* (1 N.-W. P., H. C. Rep. 146,) approved. *Narayan Undir Patil v. Motilal Ramdas*, 1 Bom. 45.

BOND TO BURDEN OF PROOF.

226. ——— See Nos. 455, 587 (a) and 587 (b).

227. ——— For performance of duties of office—*Principal and surety—Clerk of Small Cause Court—Liability of surety—Act XI. of 1865, ss. 45, 51—Small Cause Court Judge—Principal Sudder Amin (Subordinate Judge)—Jurisdiction.*] Held that, in permanently investing, under s. 51, Act XI. of 1865, the Judges of the Courts of Small Causes at Agra, Allahabad, and Benaras with the powers of a Principal Sudder Ameen (Subordinate Judge), the Local Government did not exceed its power or contravene the law, although the occasional investiture of Small Cause Court Judges by name, from time to time, with the powers of a Principal Sudder Ameen may have been the mode of procedure contemplated by the legislature as the one likely to be ordinarily adopted.—(*Bijee Kooer v. Rai Damodur Doss*, H. C. R., N. W. P., 1873, p. 55, impugned.)

The defendant and *J. W. C.*, clerk of the Small Cause Court at Allahabad, entered into a bond to the Judge of the Small Cause Court, as well as to his successors in office, in a certain sum as security for the true and faithful performance by *J. W. C.* of his duties as clerk of the said Court, and for his well and truely accounting for all moneys entrusted to his keeping as such clerk of the Court. Held, in a suit against the defendant as surety, that he was liable for misappropriation by *J. W. C.* of moneys arising from sales of moveable property held in execution of decrees passed by the Judge of the Small Cause Court in the exercise of his powers as Subordinate Judge, and that, had the Small Cause Court Judge not been invested, at the time of the execution of the bond, with the powers of a Subordinate Judge, the defendant's liability in respect of such moneys would not have been thereby affected.—*Crosthwaite v. Hamilton*. 1 All. 87.

228. British territory—See Act X. of 1872, s. 67 1 Bom. 50.

229. Burden of proof—*Hindu law—Inheritance—Act I. of 1872, s. 108—Act XVIII. of 1872, s. 9—Missing person—Presumption of death Act VI. of 1871, s. 24.*] The reversioners next after *J* to the estate of *S* deceased sued to avoid an alienation of *S*'s estate affecting their reversionary right made by his widow. *J* had not been heard of for eight or nine years, and there was no proof of his being alive. Held, that his death might be presumed under the provisions of s. 108, Act I. of

1872, for the purposes of the suit, although, in a suit for the purpose of administering the estate, the Court might have to apply the Hindu law of succession prescribed when a person is missing and not dead—*Parmeshar Rai v. Bisheshar Singh*. 1 All. 53.

230. Burden of proof. 1 Bom. 295—See *onus probandi*.

231.—As to ownership—*Redemption of mortgage—Act I. of 1872, s. 110—Partial relief.*] The plaintiffs, averring that their ancestor had mortgaged three villages to the ancestors of the defendants in 1842 for Rs. 2,500, putting the mortgagees into possession, sued to recover possession of 15 biswas of each village, asserting that the mortgage-debt had been redeemed from the usufruct. The defendants, admitting the proprietary title of the ancestor of the plaintiffs to the villages, alleged, as to 10 biswas of each village, that they were sold to their ancestors in 1842 by him for Rs. 1,250; and, as to the other 10 biswas of each village, that they were subsequently mortgaged to their ancestors by him for Rs. 14,000, borrowed by him from them for the purpose of defending a suit arising out of the previous sale, which sum had not been satisfied from the usufruct. *Held*, (STUART, C. J., dissenting), that the burden of proving the mortgage of the 10 biswas of each village of which the defendants alleged the sale lay on the plaintiffs.

Per STUART C. J., contra.

Held also (STUART, C. J. and TURNER, J., dissenting), that the plaintiffs, having failed to prove the averments on which their suit was based, were not entitled to any relief in respect of that portion of the property in suit of which the defendants admitted their possession as mortgagees.

Per STUART C. J. and TURNER, J. contra. Ratan Kuar v. Jiwani Singh. 1 All. 194.

232. Carrier—See *Negligence*. 1 All. 60—See *Railway Company*. 1 Bom. 52.

233. Cause of Action—See Nos. 420 and 568 (a.)

234. Ceremonies of Betrothal. [1 Calc. 74—See *Act VIII. of 1859*, ss. 92 & 93.

235. Certificate—See Nos. 108 and 109, “Confession” 1 Bom. 219.

236.—By Advocate-general under letters patent, (H. C.), of 1865, cl. 26 1 Calc. 207—See *Act X. of 1872*, ss. 25, 26 & 167.

CERTIFICATE TO CIVIL COURT JURISDICTION.

237. Certificate of Administration under Act XXVII. of 1860.—See No. 182.

238. Certified purchaser—1 All. 235—See Act VIII. of 1859, s. 260.

239. Charge under, ss. 292 & 294, Penal Code—1 Calc. 356—See Act X. of 1875, s. 147—2.

240. —— Vagueness of—1 Calc. 450—See Act X. of 1872, s. 471.

241. Charitable gift—*Failure of object—Cypres performance.*] The doctrine of *Cypres* as applied to charities rests on the view that charity in the abstract is the *substance* of the gift, and the particular disposition merely the *mode*, so that, in the eye of the Court, the gift, notwithstanding the particular disposition may not be capable of execution subsists as a legacy which never fails and cannot lapse.

It cannot be laid down as a general principle that the *cypres* doctrine is displaced where the residuary bequest is to a charity, or that among charities there is anything analogous to the benefit of survivorship, since cases may easily be supposed where the charitable object of the residuary clause is so limited in its scope, or requires so small an amount to satisfy it, that it would be absurd to allow a large fund bequeathed to a particular charity to fall into it.

On the failure of a specific charitable bequest, jurisdiction arises to act on the *cypres* doctrine, whether the residue be given in charity or not, unless upon the construction of the will a direction can be implied that the bequest if it fails should go to the residue.

In applying the *cypres* doctrine, regard may be had to the other objects of the testator's bounty, but primary consideration is to be given to the gift which has failed, and to a search for objects akin to it. The character of a charity as being for the relief of misery in a particular locality may guide the Court in framing a *cypres* scheme to benefit that locality.

Unless the *cypres* scheme framed by the lower Court be plainly wrong, a Court of appeal should not interfere with it.—*The Mayor of Lyons v. The Advocate-General of Bengal.* 1 Calc. 303.

242. Charity. 1 Bom. 269—See Hindu Will.

243. Civil Court Jurisdiction of—See Act XI. of 1865, ss. 6 & 12-1 Calc. 123.—See Act, Bengal, III. of 1864, s. 33. [1 Calc. 409 No. 300, 421 & 422.

S. 339.

295. Where a Police officer refused to let a person go home until he had given bail, he was held guilty of wrongful restraint under S. 339 Penal Code.—10 W. R., Cr., 20.

S. 342.

296. Where the Police on the instigation of the village officers arrested certain persons and it was found that the village officers acted maliciously—*Held*, that the Police and village officers were properly convicted of wrongful confinement and abetment thereof.—5 Mad. H. C. R., 24.

297. The High Court declined to interfere where a Deputy Magistrate directed the discharge of an accused under S. 342 Penal Code; because the complainant and his witnesses were not present.—13 W. R., Cr., 35.

Ss. 342 & 343.

298. When an act of restraint or confinement in an attempt to kidnap has been exercised in furtherance of the attempt, and goes to form part of that offence, and is not done with an intention or object which can be separated from the general intention to kidnap, it will constitute an integral part of that offence, and should not form the subject of a separate conviction and sentence.—*Queen v. Mungroo and Puttroo*. 3 N. W. P. 293.

S. 344.

299. Fine alone is not a legal sentence for a prisoner convicted under Sec. 344 of the Indian Penal Code.—*Reg. v. Babirji bin Krishnaji*, I Bom. H. C. R., 39.

S. 347.

300. A charge of assault and theft should not be dismissed for default of complainant's attendance.—1 W. R., Cr., 25. See 5 W. R., Cr., 51.

S. 348.

301. According to S. 348 Penal Code, wrongful confinement cannot be punished with fine only, but with imprisonment also.—5 W. R., Cr., 5.

S. 351.

302. Any gestures calculated to excite in the party threatened a reasonable apprehension that the party threatening intends immediately to offer violence, or in the language of this Code, “is about

"to use criminal force" to the person threatened, constitute, if coupled with a present ability to carry such intent into execution, an assault in law.

Mere words do not amount to an assault but the words which party threatening uses at the time may either give his gestures such meaning as may make them amount to an assault.

In order to have this latter effect the words must be such as clearly to show the party threatened that the party threatening has no present intention to use immediate criminal force.—*A. C. Camara v. H. F. Morgan*, I. Bom. H. C. R., 205.

S. 352.

303. The plea of *autrefois acquit* was held admissible in the case of a person who was charged with causing hurt after having been acquitted on a charge of using criminal force under S. 352 Penal Code.—16 W. R., Cr., 3.

304. In a case of assault, a sentence inflicting a fine, and awarding imprisonment for one month in default of payment of the fine, was held to be illegal with reference to ss. 65 and 352 Penal Code.—16 W. R., Cr., 42.

S. 353.

305. A Collectorate peadah deputed to keep the peace during a restraint, acts in the execution of his duty from the time the duty was entrusted to him until he wholly executes it ; and an assault committed on him whilst going to the spot to carry out the duty is an offence under s. 353 Penal Code.—13 W. R., Cr., 49.

306. Using criminal force under s. 353 Penal Code and restraining a prisoner from lawful custody cannot be punished separately.—12 W. R., Cr., 2.

307. Where cumulative sentences under ss. 183 and 353 Penal Code were held not contrary to s. 71.—14. W. R., Cr., 19.

308. Where cumulative sentences under ss. 143 and 353 Penal Code were upheld.—16 W. R., Cr., 70.

S. 361.

309. The consent of a kidnapped person is immaterial ; nor is it necessary for a conviction under s. 361 Penal Code to prove force or fraud.—2 W. R., Cr., 5. See also 7 W. R., Cr., 36.

S. 363.

310. Accused was convicted by the Magistrate of abetting the kidnapping of a minor. Accused knowing that the minor had left home without the consent of his parents, and at the instigation of one Kormaren, the actual kidnapper, undertook to convey the minor to Kandy in Ceylon, and was arrested on the way thither. The Sessions Judge reversed the conviction on the ground that there was no concert between the accused and Kormaren previous to the completion of kidnapping by the latter.—*Held* by the High Court that so long as the process of taking the minor out of the keeping of his lawful guardian continued, the offence of kidnapping might be abetted, and that in the present case the conviction should be of an offence punishable under ss. 363 and 116 of the Penal Code.—*Regina v. Samia Kaundar*. I. L. R. 1 Mad. 173.

311. The consent of a kidnapped person is immaterial. So also under s. 366 :—3 W. R., Cr., 15 (4 R. J. P. J. 574.).

312. A person carrying off, without the consent of her father, a girl betrothed to him by the father, is guilty of kidnapping punishable under s. 363.—4 W. R., Cr., 7.

313. A conviction under both ss. 363 and 366 is not good.—7 W. R., Cr., 56.

314. A conviction under both ss. 363 and 369 is not good.—8 W. R., Cr., 35.

S. 366.

315. A charge of abduction will not lie under s. 366 Penal Code, where the woman being of mature age herself wishes to become a prostitute.—1. W. R., Cr., 45 (4 R. J. P. J. 119).

316. The consent of a kidnapped person is immaterial ; so also under s. 363.—3 W. R., Cr., 15. (4 R. J. P. J. 574.).

317. A conviction under both ss. 363 and 366 is not good.—7 W. R., Cr., 56.

S. 368.

318. The mere circumstance of a girl, who had been kidnapped, staying in the house of a person for a day or two does not warrant the conclusion that she was wrongly concealed by that person with the object of baffling any search that might be made for her.—*Queen v. Mussamatt Chubia and others*. 5 N. W. P. 189.

319. The mere fact of a girl being received into a house and

retained there by the owner, even after he may have become aware or found reason to believe that she had been kidnapped does not amount to concealment of her, unless, an intention of keeping her out of view be apparent.—*Queen v. Jhurnup and others.* 5 N. W. P. 133.

320. S. 368 refers to some other party who assists in concealing any person who has been kidnapped, and not to the kidnappers.—6 W. R., Cr., 17.

S. 369.

321. A conviction under both ss. 363 and 369 is not good.—8 W. R., Cr., 35.

S. 370.

322. The Sessions Judge was held bound to try the accused upon his commitment on a charge, under s. 370 Penal Code, of having detained a woman against her will as a slave.—16 W. R., Cr., 73.

S. 372.

323. What constitutes the offence of selling a minor for purposes of prostitution under ss. 372 and 373 Penal Code.—14 W. R., Cr., 39.

324. Held that the dedication of a minor girl under the age of 16 years to the service of a Hindu Temple, by the performance of the *sheg* ceremony, where it was shown that it was almost invariably the case that girls so dedicated led a life of prostitution, was a disposing of such minor knowing it to be likely that she would be used for the purpose of prostitution, within the meaning of s. 372 of this Code.—*Reg. v. Jaib Bhawin.* 6. Bom. H. C. R. 60.

325. Where children under 16 years of age are dedicated to the service of a pagoda as dancing girls, the parents who so dedicate them and the pagoda servant who so receives and registers them are liable under these Sections.—5 Mad. H. C. R., 415.

326. Per Scotland, C. J.—It is not necessary that the buying, hiring or obtaining possession of, should be from a third person, but it is necessary to prove that the possession was obtained on the understanding that the minor's person should be for some time completely in the control of the party obtaining possession and the words *for the purpose of prostitution* mean *for the purpose of promiscuous sexual intercourse*.—Semble, that one single act of sexual intercourse is not an *employment* or use for an unlawful or immoral purpose.

Per *Holloway*, J.—Section 373 contemplates a contractual transaction of which other parties are the subjects and the minor the object.

Per *Innes*, J.—Possession means a possession with the power of disposal.—5 Mad. H. C. R., 473.

S 373.

327. Section 373 of the Indian Penal Code is not applicable to a case where a man solicits a girl to have sensual intercourse with him, and having no other intention or purpose in view.—*Queen v. Mussamal Bhutia*. 7 N. W. P. 295.

328. What constitutes the offence of selling a minor for purposes of prostitution under ss. 372 and 373 Penal Code.—14 W. R., Cr., 39.

S. 374.

329. Amends cannot be awarded in a case of unlawful compulsory labor under s. 374 Penal Code.—5 W. R., Cr., 1.

S. 378.

330. A conviction for theft under the Penal Code is illegal if the owner has given up all property in and all possession of the subject of the alleged theft.—4 Mad. H. C. R., 30.

331. The cutting down of trees without removing them may amount to theft.—5 Mad. H. C. R., 36.

332. A conviction for theft is bad unless the taking out of the possession of some person dishonestly is proved.—5 Mad. H. C. R., 37.

333. Accused was convicted by a Magistrate of theft of paddy. The facts found were that prisoner was found in possession of rice not thrashed in the usual way and that, having no paddy land of his own, he failed to account satisfactorily for the possession of the rice.—*Held*, that this was such a case as no Judge would leave to a jury and that the conviction must be quashed as founded upon evidence, which, if all true, would not justify the inference of guilt.

The meaning of the term *corpus delicti* explained.—7 Mad. H. C. R., 19.

334. A Muhammadan married woman may be convicted of theft or abetment of theft, in respect of the property of her husband.—*Reg. v. Khatabai*. 6 Bom. H. C. R., 9.

335. A Hindu woman who removes from the house of her husband, and without his consent, her *pallu* or Stridhan, cannot be con-

victed of theft, nor can any person who joins her in removing it be convicted of that offence.—*Reg. v. Natha Kalyan and Bai Lakshmi.* 8 Bom. H. C. R., 11.

336. Dishonest removal of salt naturally formed in a creek, which was under the supervision of an officer belonging to the Customs Department, constitutes theft, the salt having been legally appropriated by such officer.

But removal for one's own use from a creek of such salt not legally appropriated, constitutes no offence either under the Penal Code or Acts XXXI. of 1850 or XXVII. of 1837 though under s. 7 of the latter Act, made applicable by s. 8 of the former, the salt removed becomes liable to detention.—*Reg. v. Mansing Bhavansing.* 10 Bom. H. C. R., 74.

337. Where a number of persons come and forcibly carry off crops, they are, with reference to s. 114 Penal Code, all guilty of theft under s. 378 even though any of them took no part in the actual taking.—8 W. R., Cr., 59.

338. S. 378 Penal Code does not include, under the offence of theft, the case of one co-sharer taking into his sole possession property belonging to and in the joint possession of himself and his co-sharers.—15 W. R., Cr., 51.

339. A boat is moveable property under s. 378 Penal Code and may be the subject of theft.—16 W. R., Cr., 63.

340. The taking of fish in that portion of a navigable river over which a right of julkur exists in another person, does not fall within s. 378 Penal Code.—19 W. R., Cr., 47 ; 20 W. R., Cr., 15.

S. 379.

341. A sentence of whipping cannot, with reference to s. 7 Act VI. of 1864, be passed on a conviction for theft under s. 379 Penal Code, in addition to transportation for life under s. 75 of the Code, s. 379 only providing for sentences of imprisonment for a term not exceeding 3 years.—21 W. R., Cr., 40.

S. 380.

342. *Quaere.* Whether cumulative sentences under ss. 454 and 380 Penal Code are legal.—3 W. R., Cr., 19.

343. The splitting of one aggravated offence into separate minor offences (e. g. lurking house trespass in order to commit theft under s. 457 Penal Code into lurking house trespass and theft under ss. 456

and 380) prohibited.—(F. B.)—6 W. R., Cr., 39. See also 6 W. R., Cr., 48, 92.

344. Theft by a hired boatman on board a boat comes under s. 380 Penal Code.—8 W. R., Cr., 32.

345. On a conviction for theft under s. 380 Penal Code, fine cannot be substituted for, though it may be added to, imprisonment.—16 W. R., Cr., 17.

346. All that is necessary to constitute the offence of theft in a building under s. 380 Penal Code, is that the property should be under the protection of the building, and not that the prisoner entered the building unlawfully.—24 W. R., Cr., 49.

S. 381.

347. Theft by policemen of money shut up in a box and placed in the Police Treasury buildings over which they were placed in charge, is punishable under s. 381 Penal Code, and not s. 409.—2 W. R., Cr., 55 (4 R. J. P. J. 362), 3 W. R., Cr., 29.

S. 383.

348. A conviction of extortion by a Full Power Magistrate, and an order of a Sessions Judge rejecting an appeal therein, reversed by the High Court under s. 297 of Crim. Proc. Code; as there was no such *fear of injury* as is contemplated by s. 383 of the Indian Penal Code; nor was the delivery of money by the complainants *thereby induced*; nor did it appear from the evidence that the money was obtained *dishonestly* by the prisoner, who might have demanded it, believing in good faith that he was entitled to it. *Reg. v. Abdul Kadur.*—3 Bom. H. C. R., 45.

349. The tenor of a criminal charge is a fear of injury under s. 383 Penal Code, and extortion under ss. 388 and 389 may be equally committed whether the charge threatened be true or false.—7 W. R., Cr., 28.

350. The making use of real or supposed influence to obtain money from a person against his will under threat, in case of refusal, of loss of appointment, is extortion within the meaning of s. 383 Penal Code.—18 W. R., Cr., 17.

S. 384.

351. Held that it is not necessary in a case of extortion, under this Code, that the threat should be used, and that the property re-

ceived, by one and the same individual ; nor that the receiver should be charged with abetment, although that might be done.—*Reg. v. Shankar Bhugvat and another.* 2. Bom. H. Cr., 417.

S. 388.

352. The tenor of a criminal charge is a fear of injury under s. 383 Penal Code, and extortion under ss. 388 and 389 may be equally committed whether the charge threatened be true or false.—7 W. R., Cr., 28.

S. 389.

353. The tenor of a criminal charge is a fear of injury under s. 383 Penal Code, and extortion under ss. 388 and 389 may be equally committed whether the charge threatened be true or false.—7 W. R., Cr., 28.

S. 390.

354. Dishonest intention is the main ingredient in the offence of robbery.—5 Mad. H. C. R., 39.

S. 392.

355. Robbery and voluntarily causing hurt, when combined, are punishable under s. 394 Penal Code alone, and not under ss. 392 and 394.—2 W. R., Cr., 2.

S. 394.

356. Where, in the commission of a robbery, death was caused by a blow with a lattee on a tender part of the head, the conviction was altered from one under s. 394 Act XLV. of 1860 to one under s. 325.—6 W. R., Cr., 16.

357. Robbery and voluntarily causing hurt, when combined, are punishable under s. 394 Penal Code alone, and not under ss. 392 and 394.—2 W. R., Cr., 2.

S. 395.

358. A person guilty of dacoity with murder is punishable under s. 396 Penal Code, and not separately for murder under s. 302 and for dacoity under s. 395.—W. R., Sp., Cr., 30.

359. Where a body of men attack and plunder a house, the mere fact of the proprietor's family having made their escape a few minutes before the robbers found an entrance, does not take that offence out of the purview of s. 395. It is sufficient for the application of the Section that the robbers cause or attempt to cause the fear of instant hurt or of wrongful restraint.—7 W. R., Cr., 35.

360. Where, in consequence of a discrepancy between the finding and sentence in a case of dacoity, the finding was amended by substituting s. 395 for ss. 397 and 511 Penal Code.—7 W. R., Cr., 49.

361. Where the charge was originally one of dacoity under s. 395 Penal Code, but during the progress of the case the charge under that Section was lost sight of and the accused were put on their defence on a charge of being members of an unlawful assembly under s. 143,—*Held* that had the complaint been one under s. 143 and not under s. 395, it might have been made the subject of a summary trial under s. 222 Act X of 1872.—21 W. R., Cr., 89.

S. 396.

362. A person guilty of dacoity with murder is punishable under s. 396 Penal Code, and not separately for murder under s. 302 and for dacoity under s. 395.—W. R., Sp., Cr., 30.

S. 397.

363. Where, in consequence of a discrepancy between the finding and sentence in a case of dacoity, the finding was amended by substituting s. 395 for ss. 397 and 511 Penal Code.—7 W. R., Cr., 49.

S. 400.

364. In order to establish a charge under s. 400 Penal Code, it is necessary to make out that there existed at the time specified a gang of persons associated together for the purpose of habitually committing dacoity, and that the accused was one of the gang.—23 W. R., Cr., 18.

S. 401.

365. To sustain a charge under this section, there must be proof of association and that the association was for the purpose of habitual theft. The habit can only be proved by an aggregate of acts.—6 Mad. H. C. R., 120.

S. 403.

366. Merely finding a thing and retaining it in possession, without proof of actual conversion, does not amount to criminal misappropriation under s. 403 Penal Code.—10 W. R., Cr., 23.

367. A charge of criminal misappropriation under s. 403 Penal Code should specify the person to whom the property belonged.—14 W. R., Cr., 13.

S. 404.

368. A person may commit the offence described in s. 404 Penal Code by dishonestly misappropriating the money entrusted to him, although he does not bring such money to his own use.—11 W. R., Cr., 1 ; 12 W. R., Cr., 39.

369. Held that s. 404 of the Indian Penal Code (relating to the misappropriation or conversion of "property" left by a deceased person) does not apply to immoveable property.—*Reg. v. Girdhar Dhuramdas*.—6 Bom. H. C. R. 33.

S. 405.

370. The deterioration of an article by use is not a dishonest use within the meaning of this section.—3 Mad. H. C. R. 6.

371. A person who pledges what is pledged to him may be guilty of criminal breach of trust. There are two elements, (1) the disposal in violation of any direction of law or contract, express or implied, prescribing the mode in which the trust ought to be discharged; (2) such disposal dishonestly.—6 Mad. H. C. R., 28.

372. A refusal to give up land alleged to have been mortgaged, the mortgage being denied, cannot be treated as a dishonest misappropriation of the documents of title amounting to a criminal breach of trust, under s. 405.—*Reg. v. Jaffir Naik*. 2 Bom. H. C. R. 133.

373. Where some silver was entrusted to the prisoners for the purpose of making ornaments they introduced copper :

It was held that the offence amounted to criminal breach of trust and not cheating. *Reg. v. Babaji bin Bhawelal*.—4 Bom. H. C. R., 16.

374. Where a conviction of a person for criminal breach of trust was quashed on the ground that he was a partner with the prosecutor.—9 W. R., Cr., 37. Overruled by F. B., who held that a partner dishonestly misappropriating or converting to his own use partnership-property is guilty of criminal breach of trust under s. 405 Penal Code.—(F. B.) 21. W. R. Cr., 59.

375. If a mortgagor in possession in trust for mortgagee causes the property to be sold for arrears of Government revenue and purchases it *benamie*, he is liable to be punished for criminal misappropriation under s. 405 Penal Code.—5 W. R., 230.

S. 406.

376. Where it appeared that the property mis-appropriated by the prisoner was entrusted to him by the complainant the High Court annulled the conviction for criminal misappropriation of property and directed the accused to be tried for criminal breach of trust under s. 406.—*Reg. v. Ganu valad Ramchandra*.—4 Bom. H. C. R., 3.

S. 408.

377. Where a constable who was improperly charged with the custody of Government monies and gave security for the same, dishonestly converted it to his own use, although he afterwards restored it, the case was held to fall under s. 408, and not s. 409, Penal Code.—8 W. R., Cr., 1.

378. Refusal of a servant receiving money to account for it, or falsely accounting for it, is criminal breach of trust under s. 408 Penal Code.—10 W. R., Cr., 28.

S. 409.

379. A village Shroff, whose duty it was to assist in collecting the public revenue, received grain from ryots and gave receipts as if for money received by virtue of a private arrangement—*Held*, that he could not be convicted of criminal breach of trust by a public servant under s. 409 of the Penal Code, as he was not authorized to receive the public revenue in kind and the party who delivered the grain did not thereby discharge himself from liability for the revenue.—4 Mad. H. C. R., 32.

380. Where a person was convicted by a Magistrate, under s. 409 of the Indian Penal Code, for committing criminal breach of trust in the capacity of a public servant, and was acquitted by the Sessions Court, in appeal on the ground that the breach of trust was not committed in such capacity, and the facts proved constituted the offence of criminal breach of trust, the High Court, on the appeal of Government, directed a new trial by the Magistrate on charges under s. 406 of the Indian Penal Code, under the provisions of s. 272 of Act X. of 1872.

The Court concurred in the view taken by the High Court of Madras (VII. Mad. H. C. R., 339) that the powers under s. 272 should be exceptionally exercised.—*Queen v. Dukaran*. 7. N. W. P., 196.

381. Where a constable who was improperly charged with the custody of Government monies and gave security for the same, dishonestly converted it to his own use, although he afterwards restored it, the case was held to fall under s. 408, and not s. 409, Penal Code.—*8 W. R., Cr., 1.*

382.—S. 409 Penal Code does not limit the mode in which a trust arises, whether by specific order or by reason of its being part of the proper duty of a public functionary. Where, therefore, it was proved that the Head Clerk of an office entrusted the management of stamps, with the knowledge and sanction of the superiors, to one of his assistants, the latter was held guilty of criminal breach of trust when he made away with the stamps.—*13 W. R., Cr., 77.*

383. Theft by policemen of money shut up in a box and placed in the Police Treasury buildings over which they were placed in charge, is punishable under s. 381 Penal Code, and not s. 409.—*2 W. R., Cr., 55* (*4 R. J. P. J. 362*), *3 W. R., Cr., 29.*

S. 410.

384. Money obtained upon forged Money Orders is not stolen property within the definition thereof given in s. 410 Penal Code.—*24 W. R., Cr., 33.*

S. 411.

385. The offence of dishonest retention of stolen property under this Section may be complete without any guilty knowledge at the time of receipt.—*4 Mad. H. C. R., 42.*

386. Where prisoners are charged with assisting in concealing or disposing of property, which they know or have reason to believe to be stolen, the nature of the property, as well as the circumstances under which it was being made away with, must be taken into consideration.—*Reg. v. Hari Shankar.* *2 Bom. H. C. R., 136.*

387. Where a case of possession of stolen property was held to fall under s. 411 and not s. 412 Penal Code.—*18 W. R., Cr., 25.*

388. Smuggling India-rubber is not an offence under s. 411 without proof of guilty knowledge on the part of the accused that the rubber had been stolen.—*18 W. R., Cr., 63*; *19 W. R., Cr., 37.*

S. 412.

389. Where a case of possession of stolen property was held to fall under s. 411 and not s. 412 Penal Code.—*18 W. R., Cr., 25.*

S. 414.

390. A sentence of transportation under ss. 59 and 412 Penal Code cannot exceed 10 years.—5 W. R., Cr., 16.

391. The only evidence of the receipt of stolen property by a wife being that the property was found in the house where she lived with her husband,—*Held* that, that constituted the possession of the husband rather than that of the wife.—*Queen v. Desilva.* 5 N.W.P. 120.

S. 415.

392. The defendant was convicted of cheating. He applied to the Tahsildar for a specified quantity of land on cowle tenure free of tax for five years and falsely represented that the land was waste-land.—*Held*, a good conviction.—6 Mad. H. C. R., 12.

393. An indictment for cheating should state that the property obtained is the property of the person defrauded.—1 Mad. H. C. R. 31.

394. Where the accused secretly entered an exhibition building without having purchased a ticket and was there apprehended, it was held that such act did not amount to the offence of cheating under s. 415.—*Reg. v. Mukerunji. Bejanji.* 6 Bom. H. C. R. 6.

395. Where the High Court directed a case to be sent to the Magistrate to investigate it and consider whether there was any ground for instituting criminal proceedings, under ss. 415, 423, or 464 Penal Code, against parties who had set up fraudulent deeds.—5 W. R. 61., 20 W. R., 110.

S. 417.

396. A passenger by Railway travelling in a carriage of higher class than that for which he has paid fare is not guilty of cheating under s. 417 of this Code, but is chargeable under the Railway Act,—*Reg. v. Dayabhui Perjuram.* I. Bom. H. C. R. 140.

397. Where the accused at first made an offer to mortgage certain property as a security for outstanding debts and intended to complete the offer, but afterwards changed his mind, would not complete the transaction, unless rupees two hundred were paid to him.

Held that the accused could not be convicted of cheating because to justify a conviction for that offence there must be some evidence of an intention to cheat at the time when the promise (the omission to perform which completes the offence of cheating) is made.—*Reg. v. Hurrigovindus and Harkishandas.* 9 Bom. H. C. R., 448.

398. A person hiring certain property for use at a wedding, paying a portion of the hire and giving a written promise to pay the balance of the hire and to restore the property after the wedding he being well aware, that there was to be no wedding, and intending when he got the property to apply for its attachment in a Civil Suit in respect of an alleged claim, is guilty of cheating.—*Queen v. Radha Bila.* 3 N. W. P. 16.

399. The prisoners received a Government promissory note, promising to return certain jewels pledged to them, but not intending to do so, and they subsequently claimed to retain the note for another debt alleged to be due to them by the sender.—*Held*, that they were guilty of cheating.—The *Queen v. Shcodarshan Das.* 3 N. W. P. 17.

S. 419.

400. Where B personated A (who was unable by sickness to go herself) in registering a deed, B was held guilty, not of cheating by personation under s. 419 Penal Code, but of an offence under s. 93, Act XX. of 1866.—11 W. R., Cr., 24.

S. 422.

401. Where A entered into an agreement with B not to compromise a case with C, because he had assigned the benefit of the suit to B as a security for the due payment of some monthly instalment of money, and A notwithstanding did afterwards compromise the suit with C.—*Held* that A could not be convicted under s. 422 Penal Code unless the compromise with C. was made dishonestly or fraudulently towards B.—22 W. R., Cr., 46.

S. 423.

*402. Where the High Court directed a case to be sent to the Magistrate to investigate it and consider whether there was any ground for instituting criminal proceedings, under ss. 415, 423, or 464 Penal Code, against parties who had set up fraudulent deeds.—5 W. R. 61, 20 W. R. 110.

S. 424.

403. Where a Deputy Magistrate, considering that the attachment of a carriage in execution of a decree of a Civil Court was illegal because it was placed in the custody of the judgment-debtor's husband, and that the husband had acted fraudulently in recovering and concealing the wheels and axles of the carriage on its subsequent dis-

straint for arrears of Municipal tax, convicted him of an offence under s. 424 Penal Code, the conviction was set aside as improper.—8 W. R., Cr., 17.

404. The offence which s. 424 Penal Code contemplates is a fraudulent removal or concealment of property from the place where it is deposited, whether the fraud is intended to be committed on creditors or partners.—21 W. R., Cr., 10.

S. 425.

405. To constitute the offence of mischief according to the Penal Code, the act done must be shown to have caused destruction of some property or such a change in the property or the situation of it as destroys or diminishes its value or utility or affects it injuriously. The probable consequential damage to other property would not of itself constitute mischief.—4 Mad. H. C. R., 16 ; 7 Mad. H. C. R., 39.

406. The grazing of cattle on lands belonging to Government without payment of the capitation fee which the grass renter was entitled to collect does not amount to mischief.—5 Mad. H. C. R., 29.

407. Certain persons were convicted of mischief for injuring a bridge whilst floating timber down the river. The owner of the timber was also convicted.—*Held*, that the convictions were bad, there being no evidence of intention or knowledge.—5 Mad. H. C. R., 40.

408. The mere fact of allowing cattle to stray, whereby damage is caused to the complainant, affords no evidence to support a conviction on the charge of mischief.—6 Mad. H. Cr., 36.

409. When mischief caused by cattle trespass falls under s. 425 Penal Code and s. 17 Act III of 1857.—10 W. R., C. R., 29. See also 14 W. R., Cr., 31.

410. Cutting and taking away bamboos (especially where there was a dispute as to the title to the land on which the bamboos were) was held not to be mischief under s. 425 Penal Code.—21 W. R., Cr., 38. But see 25 W. R., Cr., 46.

S. 427.

411. A sentence for being members of an unlawful assembly under s. 144 Act XLV of 1860 renders unnecessary separate sentences for house trespass and mischief under ss. 448 and 427.—3 W. R., Cr., 54.

S. 430.

412. Held by the majority of a Full Bench, Innes J. dissenting, that it is not part of the definition of the offence of causing a diminution of water-supply for agricultural purposes, that the act of the accused should be a mere wanton act of waste. It is sufficient that the act is done without any show of right.—*Rama Krishna Chetti v. Palamiyandi Kudambai*. I. L. R., 1 Mad. 263.

413. A suit will lie for a declaration that a *nullah*, in respect of which criminal proceedings for mischief had been successfully taken against plaintiff's tenants under s. 430 or s. 432 Penal Code, was his own exclusive property and therefore, not such a stream as could come under those sections.—27 W. R., 329.

S. 431.

414. The dismissal of complaint by a Magistrate under ss. 180 and 244 Act XXV of 1861, as amended by Act VIII. of 1869, was set aside in a case in which the accused were charged with an offence under s. 431 Penal Code by rendering a navigable channel impassable.—14 W. R., C. R., 63.

S. 432.

415. A suit will lie for a declaration that a *nullah*, in respect of which criminal proceedings for mischief had been successfully taken against plaintiff's tenants under s. 430 or s. 432 Penal Code, was his own exclusive property and therefore, not such a stream as could come under those Sections.—22 W. R., 329.

S. 441.

416. Forceable entry upon land in the possession of another and erection of a building thereon or any other act done with intent to annoy the person so in possession, irrespective of the question of title to the land, constitute criminal trespass under s. 441 Act XLV. of 1860.—7 W. R., Cr., 28. See. 9. W. R., Cr., 1; 11. W. R., Cr., 11; 14 W. R., Cr., 25; 24. W. R., Cr., 58.

417. Where the accused secretly entered an exhibition building without having purchased a ticket, and was there apprehended.

Held, that such entry when unaccompanied by any of the intents specified in s. 441, does not amount to trespass or any other criminal offence.—*Reg. v. Meharvanji Bejanji*. 6 Bom. H. C. R. 6.

418. Accused was *Ejman* of complainant's family. Complainant obtained a decree setting aside an alienation made by accused. In execution, complainant obtained possession from the alienee. The accused entered on this land.—*Held*, that he had not committed the offence of criminal trespass.—6 Mad. H. C. R., 19.

419. The cultivation of a burial ground may amount to criminal trespass if the trespasser was not one of the persons entitled to its use.—6 Mad. H. C. R., 25.

420. The enclosure of a public footpath cannot amount to criminal trespass because there can be no intent to annoy the person (corporate) in possession. It may amount to a public nuisance.—6 Mad. H. C. R., 26.

421. One member of a joint Hindoo family does not commit criminal trespass under s. 441 Penal Code by entering the joint family house, but only when he enters the room ordinarily occupied by another member of the family.—15 W. R. Cr., 3.

422. The *bona fide* exercise of a supposed right of fishery without payment of rent, where the zemindar had not established his right to receive rent from the parties exercising such right, or to eject them as trespassers, cannot render them liable to a conviction for criminal trespass under s. 441.—18 W. R. Cr., 25.

S. 442.

423. A person who enters a house with intent to commit adultery may be convicted of house-trespass. Aliter, if his intent was to have intercourse with an unmarried female.—8 Mad. H. C. R., 6.

424. T., being an inmate of his uncle's house, broke open a chest and took out property from it. He was convicted of an offence under s. 457 of the Indian Penal Code.—*Held*, that he could not properly be convicted under that section. *Queen v. Tussadduk Hossein*.—6 N.-W. P. 301.

S. 448.

425. A sentence for being members of an unlawful assembly under s. 144 Penal Code renders unnecessary separate sentences for house trespass and mischief under ss. 448 and 427.—3 W. R., Cr., 54.

S. 452.

426. Going with a forged warrant of arrest and taking away one of the inmates against his will under the authority of such warrant, is house trespass under s. 452 Penal Code.—12 W. R., Cr., 83.

S. 456.

427. The splitting of one aggravated offence into separate minor offences (e. g. lurking house trespass in order to commit theft under s. 457 Penal Code into lurking house trespass and theft under ss. 456 and 380) prohibited.—(F. B.)—6 W. R., Cr., 39. See also 6 W. R., Cr., 48, 92.

S. 457.

428. A Bench of Magistrates has no jurisdiction to try a prisoner for an offence under s. 457 Penal Code.—23 W. R., Cr., 6.

429. House breaking by night and theft form a single offence, and cannot be punished separately, but under s. 457 Penal Code.—2 W. R., Cr., 63. (4 R. J. P. 563); 5 W. R. Cr., 49; 6 W. R. Cr., 48; 8 W. R. Cr., 31.

430. The splitting of one aggravated offence into separate minor offences (e. g. lurking house trespass in order to commit theft under s. 457 Penal Code into lurking house-trespass and theft under ss. 456 and 380) prohibited.—(F. B.) 6 W. R. Cr., 39. See also 6 W. R. Cr., 48, 92.

S. 463.

431. The subsequent falsification of a *Rosnamcha Bahi* kept in the Office of a Deputy Inspector of Schools by the Mohurrir in charge thereof for the purpose of concealing frauds previously committed, merely with a view to avoid disgrace and punishment, held not to fall within the definition of forgery as given in the Indian Penal Code. Queen v. *Jageshwar Pershad*.—6 N.-W. P. 56.

432. A signed B's name to petitions presented by C. to a Mamlatdar requesting his summary assistance under Regulation 17 of 1827, for the recovery of rents from B's tenants.

Held that even if A had no authority from B to sign his name, and if A wishes to deceive the Mamlatdar into this belief that it was B himself who had signed the petitions, still if there had been no

intention to defraud any body, or if no wrongful gain or wrongful loss could have been caused to A. or B., A's act did not constitute forgery within the meaning of this Code.

The argument that A. by so presenting petitions for B. saved B. from the trouble of instituting suits in the Civil Court, and so caused wrongful loss of stamp duty to the Government cannot be sustained, as avoidance of litigation is no wrongful loss to Government.

—*Reg. v. Bhavani Shankar*—11 Bom. H. C. R. 3.

433. The forgery of a copy of a document comes within the definition of forgery as given in s. 463 Penal Code.—W. R. F. B., 71 (2 Hay 236 ; Marshall 270.)

434. Unauthorizedly signing a *vakalutnamah* in the name of co-decree-holders and delivering it to a vakeel with instructions to file a petition stating that the debt had been satisfied and praying that the case may be struck off the file, is forgery under s. 463 Penal Code.—6 W. R., Cr., 78.

435. The simple making of a false document constitutes forgery under s. 463, and it is not necessary that it should be issued or made known to the injury of a person's reputation, either by being presented in Court or shown to any person. A false document may be made in the name of a fictitious person.—10 W. R., Cr., 61.

S. 464.

436. It must be proved that the accused practised deception so as to prevent a person from knowing the nature of the document before the accused can be found guilty under s. 464.—9 W. R., Cr., 20.

437. Where a fraudulent misrepresentation in writing was held not to amount to forgery under s. 464 Penal Code.—21 W. R., Cr., 41.

438. Where the High Court directed a case to be sent to the Magistrate to investigate it and consider whether there was any ground for instituting criminal proceedings, under ss. 415, 423, or 464 Penal Code, against parties who had set up fraudulent deeds.—5 W. R. 61 ; 20 W. R. 110.

S. 465.

439. A Civil Court has no power to order the commitment of persons for offences under ss. 471, 465, and 193 Penal Code without

holding the preliminary enquiry required by s. 474 Act X of 1872.—22 W. R., Cr., 52.

S. 466.

440. A conviction may be had, under ss. 466 and 471 Penal Code, for using as genuine a forged document purporting to be made by a public servant in his official capacity, notwithstanding the illegibility of the seal and signature thereon.—5 W. R., Cr., 96.

S. 467.

441. The forging a document which purports on the face of it to be a copy only, and which, even if a genuine copy, would not authorize the delivery of moveable property, is not punishable, under s. 467 of this Code. *Reg. v. Naro Gopal*.—5 Bom. H. C. R., 56.

442. A fraudulent alteration of a Collectorate Challan is a forgery under s. 467 Penal Code.—W. R. Sp., Cr., 22.

S. 469.

443. Where a draft petition was prepared with the intention of being used as evidence of a matter, it was held to fall within s. 29 Penal Code ; and as it contained false statements calculated to injure the reputation of a person, the offence was held to fall within s. 469.—10 W. R., Cr., 61.

S. 471.

444. A Civil Court has no power to order the commitment of persons for offences under ss. 471, 465, and 193 Penal Code without holding the preliminary enquiry required by s. 474 Act X of 1872.—22 W. R., Cr., 52.

445. Convictions under s. 471 of the Indian Penal Code and s. 474 cannot stand together.—*Queen v. Nazar Ali*. 6 N. W. P. 39.

446. A conviction may be had, under ss. 466 and 471 Penal Code, for using as genuine a forged document purporting to be made by a public servant in his official capacity, notwithstanding the illegibility of the seal and signature thereon.—5 W. R., Cr., 96.

447. Presenting a forged deed of divorce for registration and obtaining registration is “using” within the meaning of s. 471 Penal Code.—11 W. R., Cr., 15.

S. 473.

448. Where it was held under s. 473 Penal Code that there was a complete and separate offence of forgery in respect of each of several

seals of different descriptions found in the possession of the accused with intent to commit forgery—13 W. R., Cr., 16.

S. 474.

449. In a conviction under s. 474 Penal Code, the guilty intent must be proved, not inferred.—W. B. Sp., Cr., 12.

S. 477.

450. The tearing up of a pottah is the destruction of a valuable security within the meaning of s. 477.—3 W. R., Cr., 38.

S. 484.

451. *Quaere* whether cumulative sentences under ss. 454 and 380 Penal Code are legal.—3 W. R., Cr., 19.

S. 490.

452. S. 490 Penal Code does not apply to a contract to place defendant's carts at complainant's disposal for a specified time to convey an article from where he pleases to where he pleases.—9 W. R., Cr., 12.

453. *Quaere*, Whether the words "during a voyage or journey" do not limit that section to offences against travellers.—9. W. R., Cr., 12.

454. An agreement for personal service in conveying indigo from the field to the vats is not a contract the breach of which is punishable by s. 490 Penal Code.—6 W. R., Cr., 80.

S. 494.

455. A Hindu Christian convert relapsing into Hinduism and marrying a Hindu woman cannot be convicted of bigamy on the ground that he has another wife living whom he married while a professing Christian.—3 Mad. H. C. R., 7.

456. *Held* that a custom of the Talapda Koli caste, that a woman should be permitted to leave the husband to whom she has been first married, and to contract a second marriage (Natra) with another man in his life time, and without his consent, was invalid, as being entirely opposed to the spirit of the Hindu Law, and that such marriage was "void by reason of its taking place during the life time of such husband," and therefore punishable, as regards the woman, under sec. 494 of this Code ; and that the man with whom the woman

was so married, having had sexual intercourse with her, was guilty of adultery, under sec. 497. *Reg. v. Karsan Goju*; *Reg. v. Bai Rups*—2 Bom. H. C. R., 124.

457. Courts of law will not recognize the authority of a case to declare a marriage void, or to give permission to a woman to remarry.

Bona fide belief that the consent of the caste made the second marriage valid, does not constitute a defence to a charge, under section 494 of the Indian Penal Code, of marrying again during the lifetime of the first husband, or to a charge of abetment of that offence under that section combined with section 109.—*Regina v. Sambhu Raghu*. I. L. R. 1 Bom. 347.

458. A *nikah* marriage falls within the purview of ss. 494 and 495 Act XLV. of 1860; it is a well known and well established form of marriage amongst Mahomedans.—6 W. R., Cr., 60.

S. 495.

459. The act of causing the publication of banns of marriage is an act done in the preparation to marry but does not amount to an attempt to marry.

Where therefore a man, having a wife living, caused the banns of marriage between himself and a woman to be published, he could not be punished for an attempt to marry again during the life time of his wife.—The *Queen v. Piterson*. I. L. R. 1 All. 816.

460. A woman who does not use all reasonable means in her power to inform herself of the fact of her first husband's alleged demise, and contracts a second marriage within 16 months after co-habitation with her first husband, without disclosing the fact of the former marriage to her second husband, is liable to enhanced punishment under s. 495 Penal Code.—4 W. R., Cr., 25.

461. A *nikah* marriage falls within the purview of ss. 494 and 495 Act XLV. of 1860; it is a well-known and well-established form of marriage amongst Mahomedans.—6 W. R., Cr., 60.

S. 496.

462. Proof of dishonest or fraudulent intent is necessary for a conviction under s. 496 Penal Code.—W. R. Sp., Cr., 13.

S. 497.

463.—Where a prisoner accused of adultery sets up in defence a *Natra* contracted with the woman with whom he is alleged to have

committed adultery, in accordance with the custom of his caste, the question the Court has to determine is, whether or not the accused honestly believed at the time of contracting the Natra that the woman was the wife of another man.—*Reg. v. Mahohar Ruiji.* 5 Bom. H. C. R., 17.

464. A person convicted of adultery under s. 497 Penal Code, need not be convicted also under s. 498 ; far less where there is no taking or enticing away of the woman.—2 W. R., Cr., 35.

465. The legality of a conviction of adultery before a jury was held not affected by the fact that the charge was triable, under s. 497 Penal Code, with assessors, and not by a jury.—24 W. R., Cr., 18.

S. 498.

466. A man is punishable under this section for taking away a married woman, although it may appear that she went with him of her own free will. Her consent is wholly immaterial.—2 Mad. H. C. R., 331.

467. The word *conceals* or *detains* must be taken to extend to the enticing or inducing a wife to withhold or conceal herself from her husband and assisting her to do so as well as to physical restraint or prevention of her will or action.—4 Mad. H. C. R., 20.

468. A person convicted of adultery under s. 497 Penal Code, need not be convicted also under s. 498 ; far less where there is no taking or enticing away of the woman.—2 W. R., Cr., 35.

469. Enticing or taking away with a criminal intent a wife living in her husband's house, or in a house hired by him for her occupation and at his expense during his temporary absence, is punishable under s. 498 Penal Code, provided the seducer knew, or had reason to know, that she was the wife of the man from whose house he took her.—5 W. R., Cr., 50.

470. In a charge under s. 498 Penal Code (of taking away a married woman), marriage must be presumed from the fact of a man and woman living together, and from their own evidence (altogether unrebutted) that she is his legally married wife.—17 W. R., Cr., 5.

It has been subsequently held by a Full Bench that in cases of adultery, bigamy and enticing away a married woman ; marriage must be strictly proved.—8 Legal Comp. 98.

471. A finding exactly in the words of s. 498, though not actually illegal when it is doubtful which of the several offences therein mentioned has been committed, is a finding which ought not to be resorted to if it can be avoided and it can be determined under which part of the section the prisoner is guilty.—22 W. R., Cr., 72.

S. 499.

472. A letter written by a Brahman to a Brahman community of the neighbourhood, with a view to obtain their decision on a matter affecting his own religious interests and those of the Brahman community, if written in good faith, falls within exceptions 8 and 10 of s. 499.—*Reg. v. Kashinath Bachaji Bagat.* 8 Bom. H. C. R., 168.

473. To sustain a charge of defamation it is not necessary to prove that the complainant actually suffered directly or indirectly from the scandalous imputation alleged ; it is sufficient that the accused intended, or knew, or had reason to believe that the imputation made by him would harm the reputation of the complainant.—*Queen v. Thakur Das.* 6. N.-W. P., 86.

474. S. 499 Penal Code makes no distinction between written and spoken defamation.—2 W. R., Cr., 36 (4 R. J. P. J. 172).

475. A person using defamatory expressions for the protection of his own interests, is not privileged unless the imputation is made in good faith, i. e. with due care and attention.—3 W. R., Cr., 45.

476. Act XVIII. of 1862 refers only to the High Court in its original criminal jurisdiction, and is not applicable to Mofussil Court, s. 27 of that Act requires proof of the circumstances relied on as a defence before good faith can be presumed in a case of defamation. The *onus* of proving good faith is on the person making the imputation. Before such person can claim the benefit of Exception 9 s. 499 Penal Code, he must show that he has exercised due care and caution.—4 W. R., Cr., 22. See 14 W. R., Cr., 22.

477. A report made by an officer in execution of his duty, and as the result of an order from his superior, was held to fall within the 9th Exception to s. 499 Penal Code.—14 W. R., Cr., 22.

478. What was held to amount to making or publishing an imputation within the meaning of s. 499.—14 W. R., Cr., 27.

S. 500.

479. The gumastah of a Guru or priest was convicted of defamation for having published an order of his master excommunicating the complainant from his caste. The letter publishing the excommunication was a statement that complainant disobeyed some one and treated him with disrespect.—*Held*, that the letter contained no expressions defamatory *per se*. If the person so treated was in a position entitling him to demand submission and to make non-submission an offence, then that position would render the communication privileged, and, if not, then the mere statement that the complainant did not obey one whom he was not bound to obey was not a defamatory imputation.—6 Mad. H. Cr., 46.

S. 503.

480. Where the accused went to the complainant, the brother of an adult woman, and told him that he had come from the Sirkar and would get him six month's imprisonment if he (the complainant) did not let his sister go ;

Held that these words did not constitute criminal intimidation, within the meaning of s. 503 of this Code (there having been no threat of injury in the sense of the Code); or any other offence known to the law.—*Reg. v. Motoba Bhashurji.* 8 Bom. H. C. R., 101.

481. Where an offence under s. 503 Penal Code was said to have been committed during a railway journey from Bombay to Calcutta,—*Held* that the Magistrate of Howrah had no jurisdiction to entertain the charge, and that s. 67 Act X. of 1872 did not apply.—21 W. R., Cr., 66.

S. 506.

482. Procedure under s. 506 Penal Code for criminal intimidation used against three different persons.—9 W. R., Cr., 30.

S. 511.

483. To constitute the offence of attempt under s. 511, Indian Penal Code, there must be an act done with the intention of committing an offence, and for the purpose of committing that offence, that it must be done in *attempting* the commission of the offence.

The provisions of s. 511, Indian Penal Code, do not extend to make punishable as attempts, acts done in the mere stage of prepara-

tion. Although such acts are doubtless done towards the commission of the offence, they are not in the attempt to commit the offence, within the meaning of the word "*attempt*" as used in the section.—

Queen v. Ram Saran Chowbey.—4 N.-W. P., 11.

484. Where, in consequence of a discrepancy between the finding sentence in a case of dacoity, the finding was amended by substituting s. 395 for ss. 397 and 511 Penal Code.—7 W. Cr., 49.

485. In a case in which the child was full grown, the Court declined to convict the accused of causing miscarriage under s. 312 Penal Code, but convicted them of an attempt to cause miscarriage under ss. 312 and 511.—19 W. R., Cr., 32.

CHAP. X.

535. Why the law requires the permission of the public servant for bringing a charge of contempt of lawful authority of public servant under s. 182 or any other section of Chap. X. Penal Code.—9 W. R., Cr., 31. See also 11 W. R., Cr., 22 ; 19 W. R., Cr., 33.

CHAP. XXIII.

536. Penal statutes must be strictly construed ; and it would not be right to include Chap. XXIII. of the Penal Code (relating to attempts within the provision of s. 75. when that section only mentions other Chapters of the Code).—21 W. R., Cr., 35.

537. The forgery of a copy of a document comes within the definition of forgery as given in s. 463 Penal Code.—W. R. F. B., 71 (2 Hay 236 ; Marshall 270.)

538.—Direction by the High Court for the trial of certain offences in violation of the provisions of the Penal Code.—Sev. 84, 949 ; 6 W. R., 8.

539. Where an accused was charged under certain sections of the Penal Code of an offence committed before the Penal Code came into operation, the error or irregularity was held, with reference to s. 4 Act. XVII. of 1862 and s. 426 Act XXV. of 1861, not sufficient to vitiate the conviction so long as the punishment awarded as under the Penal Code did not exceed that which was the legal penalty for the offence before the Penal Code came into operation.—15 W. R., Cr., 48. See also 17 W. R., Cr., 50 ; 15 W. R., Cr., 49.

277. All applications from Judges and Magistrates for bringing into operation the provisions of this section should be made through the High Court.—5. Mad. H. C. R., 9.

S. 340.

278. A prisoner has a right to have all or any part of a document used on his trial translated to him, yet when it is used simply as formal proof of an uncontested fact, it would not be necessary to interpret it at length.—15 W. R., 25.

S. 344.

279. Where the tender of pardon to an accused person is not warranted by s. 347, he cannot be legally examined on oath and his evidence is inadmissible, and his statement is irrelevant and inadmissible as a confession, with reference to S. 344 of the Criminal Procedure Code and to Act I of 1872, S. 24.—I. L. R., 2 All. 260.

S. 346.

280. When the examination of the prisoner by the Magistrate has not been recorded in full, so as to include the questions put to him as required by s. 346, it cannot be given in evidence at the trial before the Court of Session, under s. 248, without further proof.—*Reg. v. Timmi ; Reg. v. Kalla Rakhmaji.* 2 Bom. H. C. R., 419.

281. A detailed confession made by an accused person before a Magistrate, but retracted on the examination being read over to him in conformity with s. 346, does not amount to a confession, although the plea for retracting the confession, *viz.*, ill-treatment of the accused by the Police, may be enquired into and found untrue.—*Reg. v. Gorbad Bechar* 9 Bom. H. C. R., 314.

282. The confession of an accused person taken by a Magistrate having no jurisdiction to commit or try him, is imperfect, if not signed by the accused person or attested by his mark, and is inadmissible in evidence (ss. 122 and 346, Criminal Procedure Code). The term "Preliminary Inquiry" in the final clause of s. 346 means such inquiries as are the subject of Chapters XIV. and XV.; and, therefore, that clause does not apply to confessions recorded under s. 122 which refers to an inquiry not during a trial or one held with a view to committal, but an inquiry for the purpose of forwarding confessions,

when recorded, to the Magistrate by whom the case of the accused person is inquired into or tried. Consequently, when a confession taken under s. 122 is inadmissible in evidence, oral evidence to prove that such a confession was made or what the terms of that confession were, is inadmissible also. (s. 91, Evidence Act).—*Reg. v. Bai Ratan*. 10 Bom. H. C. R., 166.

283. The direction of the Criminal Procedure Code, s. 346, enjoining that an accused person shall sign the record of his confessions, is not satisfied by the following “signature of A. B. (the accused); the hand writing of C. D.” where the conviction of a person was based upon a confession thus subscribed, the High Court reversed it, and held that the Sessions Judge was (under s. 256) bound to prevent the production of such a confession.—*Reg. v. Daganand and Ranchod Khalpa*. 11 Bom. H. C. R., 44.

284. An accused person whose signature to a statement made by him to the committing Magistrate is not taken, as provided in s. 346, is not prejudiced thereby within the meaning of that section, unless he is unfairly affected as to his defence on the merits. Where a prisoner in the Court of Session was represented by a pleader who had opportunity to object to the admissibility of his statement, and did not, the High Court held that he was not prejudiced.—*Reg. v. Deva Dayal*. 11 Bom. H. C. R., 237.

285. A confession recorded under s. 122 of the Code of Criminal Procedure to be admissible in evidence must not only bear a memorandum that the Magistrate believed it to have been voluntarily made, but also a certificate, under s. 346, that it was taken in the Magistrate's presence and hearing, and contains accurately the whole of the statement made by the accused person. No oral evidence can be received to prove the fact of the confession, if the confession itself be inadmissible.—(*Reg. v. Bai Ratan* 10. Bom. H. C. R., 166, followed).—*Reg. v. Shriya*. I. L. R., 1 Bom. 219.

286. A confession recorded by a Magistrate, who afterwards conducts the enquiry preliminary to committal, and has jurisdiction to do so, is to be treated as an examination under Act X of 1872 s. 193 and not as a confession recorded under s. 122 notwithstanding that the prisoner may have been brought before the Magistrate before the con-

clusion of the Police investigation. To such a confession consequently the provisions of the last para of s. 346 apply.—I. L. R., 5 Cal. 95.

287. When a confession is made to a Magistrate by an accused person during an enquiry held previously to the case being taken up by the committing officer, and by an officer acting merely as a recording officer, it must be recorded in strict accordance with the provisions of Act X. of 1872 ss. 122 and 346. If the provisions of these sections have not been fully complied with by the recording officer, the Court of Session may take evidence that the accused person duly made the statement recorded ; but a Court of Session is not at liberty to treat a deposition sent up with the record and made by the recording officer before the committing officer to the effect that the accused person did in fact duly make before him the statement recorded as evidence of that fact. In such a case the recording officer must himself be called and examined by the Court of Session, except in cases in which the presence of the recording officer can not be obtained without an amount of delay or expense which, under the circumstances of the case, the Court of Session considers unreasonable.—I. L. R., 5 Cal. 958.

288. The attestation required by Act X of 1872 s. 346 is unnecessary when a confession is made in Court to the officer trying the case at the time of trial.—I. L. R., 3 Cal. 756.

289. When the confession of a prisoner under Act X. of 1872 s. 122 was not taken in the manner provided by s. 346, and was, therefore, defective.—*Held*, that the evidence of the recording officer, that such confession was actually made, was inadmissible to remedy the defect.—I. L. R., 4 Cal. 696.

290. Initials readable or unreadable are not the same as a signature, and useless under this section.—15 W. R. 63, 83.

291. The examination of an accused person should invariably, where possible, be recorded in the language of the accused. 4 W. R., 1.

292. Under s. 346, it is not necessary for the Magistrate to state in the body of the examination that the statement comprised every question put to the accused, and every answer given by him, and that he had liberty to add to or explain his answers. Attestation at the foot of the examination is sufficient, but in case of doubt, oral

evidence should be admitted to prove the regularity of the proceeding.

—7 S. L. R., (A. P.) 62.

293.—Examination of accused, how to be recorded, certified and used under s. 346.—20 W. R., C. R., 50 ; 24 W. R., Cr., 54.

294.—A confession not recorded in accordance with s. 346, is inadmissible.—24 W. R., Cr., 29, 43.

295.—S. 122 Act X. of 1872, which requires a Magistrate to certify on a confession his belief that it was voluntarily made, does not apply to the case of a confession taken by a Magistrate who is actually investigating the case and examining the witnesses preparatory to commitment; but to a case where some other Magistrate takes a confession and forwards it to the Magistrate by whom the case is enquired into or tried. S. 346 governs such a case as the former.—23 W. R., Cr., 16 ; see also 24 W. R., Cr., 42.

S. 347.

296. The provisions of this section apply to cases triable by the Magistracy concurrently with the Sessions Court, but the power cannot be properly exercised except with a view to the committal of a case or trial before a Court of Session.—3. Mad. H. C. R., 2, 4.

297. A Magistrate has no power to tender a pardon in a case which he tries himself ; but only, under this section, in the case of an offence triable exclusively by the Court of Session.—*Reg v. Remedios* and another. 3 Bom. H. C. R., Cr., C. A. 59.

298. A person accused of an offence was offered a pardon, the conditions of which he accepted, on being examined, he stated in detail the circumstances of the offence, and named the prisoner as an accomplice. He afterwards retracted this statement.—*Held*, that the statement could not be used as evidence against the prisoner.—*Queen v. Hardeva* 5 N.-W. P. 217.

299. It is not competent to a Magistrate to convert an accused person into a witness except when a pardon has been lawfully granted under this section. Evidence given by such a person who had received a pardon in the case of an offence not exclusively triable by the Court of Session, held not relevant, that person not having been acquitted or discharged or convicted.—I. L. R., 1. Bom. 610, *Reg. v. Hanuman*.

300. Where a pardon was tendered by the Magistrate to a person supposed to have been concerned with other persons in offences none of which were exclusively triable by the Court of Session, and such person was examined as a witness in the case.—*Held* that, the tender of pardon to such person not being warranted by this section, he could not legally be examined on oath, and his evidence was inadmissible ; and that the statement made by such person was irrelevant and inadmissible as a confession, with reference to s. 344 of Act X. 1872 and to Act I. of 1872, s. 24.—I. L. R., 2 All. 260.

S. 349.

301. A conditional pardon was tendered to and accepted by the accused. He then, on solemn affirmation, made a statement before the committing Magistrate in which he criminated himself and two other persons. Three days afterwards he voluntarily came forward and made, on solemn affirmation, another statement, in which he retracted and contradicted what he had said in his former statement. The conditional pardon was cancelled and the accused was put upon his trial.—*Held* that the first statement was admissible as evidence against the accused.—*Reg. v. Alibhai Metha.* 8 Bom. H. C. R., 103.

302. This section was held not to take away from the Magistrate the power of committing for trial on a charge of giving false evidence, instead of on the original charge, a party who, having been charged along with others with murder, and having had a conditional pardon granted to him by the Magistrate, retracted before the Sessions Judge the statements he had made before the Magistrate.—23 W. R. Cr., 12.

S. 359.

303. A Magistrate has no jurisdiction to order a sum of money deposited under this section to be credited to Government.—6 Mad. H. C. R., 9.

304. Act X. of 1872, s. 359 empowers a Magistrate to exercise his judgment and enquire as to the materiality of a witness who he considers is named by the accused as a witness for the purpose of vexation and delay ; but not to enquire into what the defence of the

accused is to be, and then to abstain from summoning the whole of the witnesses cited by the accused.—I. L. R., 3 Cal. 572.

S. 361.

305. An accused person is entitled to have his witnesses (when present) examined, even if those witnesses were named as implicated in the offence with which the accused is charged.—15 W. R., 7.

S. 362.

306. A Magistrate should not decide a case or discharge an accused person without taking the evidence of the prosecutor's witnesses.—7 W. R. Cr., 45, 47. See 15 W. R., Cr., 87.

S. 363.

307. Under this section, a prisoner is entitled as a matter of right to have any witnesses named in the list which he delivers to the Magistrate, summoned and examined.—23 W. R., Cr., 56.

S. 389.

308. A Magistrate should not ask for bail (when after inquiry no offence is made out against the accused) in the hope that evidence may turn up eventually.—1 B. L. R., App. 26.

S. 390.

309. The Court of Session has no power under this section to admit a convicted person to bail, a *convicted person* not being an *accused person* within the meaning of the section.—*Queen v. Thakur Parshad*. I. L. R., 1 All. 151.

310. S. 390 refers only to the period during which a case is under enquiry, and where the party concerned is still in the position of an accused ; but does not empower the Sessions Judge to admit him to bail after he is sentenced and acquitted.—24 W. R., Cr., 8.

S. 391.

311. Where the condition of bail-bonds given by the defendants and by the surety of a security bond was that the defendants should appear when called upon.—*Held*, that the defendants and their surety were entitled to reasonable notice of the time at which the former would be required to attend.—4 Mad. H. C. R., 45.

312. Recognizances should be fixed according to the position in life and condition of the accused. If broken, they are forfeited, and are recoverable as shown in s. 398 : besides this, a criminal action against the defaulter will lie under s. 174, P. C. (10 W. R., 4).

S. 396.

313. Where a defendant charged with an offence bound himself to appear before a Sub-Magistrate on the 10th June and the defendant did appear on that day but made default on the 11th of June on which date the case was called.—*Held*, that there was no forfeiture of the recognizance. In such cases s. 396 requires that the Magistrate shall form a reasonable opinion that there has been wilful default before issuing process to enforce the penalty.—4 Mad. H. C. R., 44.

314. Defendants were bound over to appear from a certain date on every day until the trial was closed. They failed to appear on one day when the case was called and their recognizances were forfeited,—*Held*, that there was no irregularity.—4. Mad. H. C. R., 38.

S. 397.

315. The powers contained in ss. 396 and 397 apply not only to recognizance taken by a Magistrate, but also to recognizance taken by a Police Officer under s. 125.—22 W. R., Cr., 74.

316. Where a surety conditioned that he would be responsible for the continued presence of an accused person at one Court (Nowadah), it was held that the surety was released from liability, under his recognizance by the permission which the Court at Nowadah gave the accused, without the surety's consent, of leaving that place on business, and also by the subsequent transfer of the case to another Court (Gya).—13. W. R., 53.

317. The powers contained in ss. 396 and 397 Act X. of 1872 apply not only to recognizance taken by a Magistrate but also to recognizance taken by a Police Officer under S. 125.—22 W. R., Cr., 74.

S. 415.

318. A. was charged before the Police with theft of certain property. The Police considered that no theft had been committed, and reported the matter to a 2nd class Magistrate, who agreeing with the Police ordered the property to be restored to A. On application

by the complainant, the District Magistrate found that A. had removed, though not dishonestly, the property from B. a deceased person ; and ordered the property to be given by the Police to B.'s heirs . It was so given.

Held, that the provisions of Chapter XXX of the Code of Criminal Procedure do not apply to such a case. Sections 415, 416 and 417 contemplate proceedings preliminary to, and independent of, enquiry upon general principles, where there has been an inquiry, or a trial, and the accused person is discharged or acquitted by any Criminal Court, that Court is bound to restore that property into the possession of the person from whom it is taken, unless, as provided for by s. 418, such Court is of opinion that any offence appears to have been committed regarding it, then such order as appears right for the disposal of the property may be made.

The High Court cannot direct the restoration of property already delivered by the Police under the illegal order of the District Magistrate. *In Re Annupurnabai*.—I. L. R., I. Bom. 631.

S. 418.

319. Where a person convicted of stealing a horse was sentenced to imprisonment and fine, and the Magistrate, relying on s. 418 Act X of 1872 and the rule of English law protecting a *bona fide* purchaser in market overt, directed the horse to be restored to such a purchaser and the fine to be paid to the complainant, so much of the order as directed payment of the fine to complainant was set aside as not warranted by s. 418, as such an order could only be made under s. 308.—20 W. R., Cr., 38.

S. 419.

320. A Government Currency note was stolen from A., and cashed by B. in good faith for C. On the conviction of C. for theft, the Magistrate ordered the note to be given to B. A appealed to the Session's Judge, who was of opinion that he was not competent to interfere as a Court of appeal under s. 419 of the Criminal Procedure Code ; but submitted the case for the orders of the High Court.

Held that the case could be disposed of by the Judge under s. 419 of the Criminal Procedure Code, and that the words "Court

of appeal" in that section are not necessarily limited to a Court before which an appeal is pending.

Held further, that the provisions of s. 76 of the Contract Act did not apply, as the change of a Currency Note for money is not a contract of sale, and that as the note came honestly into the hands of B., the order of the Magistrate was right. The Empress on the prosecution of *Michell v. Joggessur Mochi*.—I. L. R., 3 Cal. 379.

321. In the absence of an order under s. 418, the appellate or revising authority can pass no order under s. 419.—5 Mad. H. C. Rep. 21.

322. With reference to ss. 232 and 425 Act X. of 1872, where an accused person at his trial appears to the Sessions Judge to be of unsound mind, the trial of the issue of insanity is part of the trial of the accused, and ought to be tried by the jury and not by the judge personally.—19 W. R., Cr., 15.

323. The issue as to whether the accused is of unsound mind at the time of the trial and incapable of properly making his defence, is preliminary to the issue as to whether the accused was insane at the time he committed the offence, and should, under s. 425 Act X. of 1872, be first submitted to the jury.—19 W. R., Cr., 26.

S. 426.

324. The authority of the Criminal Courts over an accused, declared under s. 426 of the Criminal Procedure Code to be of unsound mind ceases after the transmission of such accused to the place of safe custody appointed by the Local Government, and such authority can only be revived under the circumstances mentioned in s. 232.—The *Empress v. Jai Hari Koer*. I. L. R., 2 Cal. 356.

S. 428.

325. Course to be pursued when on the trial of a prisoner the Court may entertain doubt as to his sanity.—*Reg. v. Hira Punja I* Bom. H. C. Rep. 38.

S. 435.

326. A Magistrate was held to have no jurisdiction in a case of contempt of Court committed before a Sub-Registrar who did not proceed under ss. 435 or 436 Act X of 1872; the Sub-Registrar

being a public officer under Act VIII of 1871, his proceedings being judicial proceedings within the meaning of s. 228 Penal Code, and his Court a Court as defined in Act I. of 1872.—22 W. R., Cr., 10.

327. A Village Magistrate has no jurisdiction to impose a fine upon a person who uses abusive language to the Village Magistrate in the course of a trial under s. 10, Regulation XI. of 1816—5 Mad. H. C. Rep., 33.

328. The defendant was convicted of contempt of Court under this section for having refused to sign a deposition given by him as a witness in the course of a revenue inquiry. The High Court set aside the conviction.—6 Mad. H. C. Rep. 14.

329. An omission by a Civil Court to call upon a person charged with contempt of Court to make any statement he may wish to make in his defence, is an irregularity fatal to the order, and the High Court will exercise its extraordinary jurisdiction, and reverse an order so made. *Kashinath Vithal v. Daji Govind.*—7 Bom. H. C. Rep. 102.

330. A. was charged before an Assistant Magistrate by a Sub-Registrar with having committed an offence under s. 228 of the Penal Code, and fined.—*Held*, that the Sub-Registrar should have tried the matter himself under ss. 435 and 436 of the Criminal Procedure Code, and as the Magistrate acted without jurisdiction, the order must be quashed. In the matter of the Petition of *Surdhari Lal*.—13 B. L. R., 40.

S. 436.

331. A Magistrate was held to have no jurisdiction in a case of Contempt of Court committed before a Sub-Registrar who did not proceed under ss. 435 or 436 Act X. of 1872; the Sub-Registrar being a public officer under Act VIII. of 1871, his proceedings being judicial proceedings within the meaning of s. 228 Penal Code, and his Court a Court as defined in Act I. of 1872.—22 W. R., Cr., 10.

332. Where the procedure laid down in this section as respects the recording the facts constituting the offence with any statement that the offender may make as well as the finding and sentence is disregarded, a conviction will be set aside as illegal.—4 Mad. H. C. R., 229.

S. 439.

333. The fact of previous convictions should under s. 439, Act X. of 1872 be stated in the charge when it is intended to prove them for the purpose of enhancing punishment.—21 W. R., Cr., 40. See also 22 W. R., Cr., 39.

S. 441.

334. A charge under s. 411 of the Penal Code, of dishonestly receiving stolen property, should state that the articles found in possession of the accused were the property of A. B., the owner thereof. *Reg. v. Suddu bin Balnath.*—I. Bom. H. C. R., 95.

S. 445.

335. On a trial by jury the Session Judge has no power to alter the charge after the delivery of the verdict.—*Reg. v. Shek Ali Valad Fukir Muhammad.*—5 Bom. H. C. R., 9.

336. Where a complaint laid before a Magistrate F. P. by certain Government employes accused the prisoner of criminal breach of trust of their wages, but from the evidence adduced it appeared that the offence of which the prisoner was guilty was criminal breach of trust of Government money.

It was held, that the Magistrate F. P. had power to frame a charge against, and convict the prisoner of, the latter offence without a fresh complaint being made to him.—*Reg. v. Dhondu Ram Chandra.* 5 Bom. H. C. R., 100.

S. 447.

337. The lawful infringement of a right of exclusive fishery in a part of a public river is not an offence which can be brought within the definition of criminal trespass in the Indian Penal Code. The *Empress v. Charu Najah.*—I. L. R., 2 Cal. 354.

S. 451.

338. The prisoner was charged under s. 471 of the Indian Penal Code with fraudulently using as genuine a forged document, and having been tried before a Session Judge and Jury was convicted of that offence.

The Session Judge considering the forged document to be of the nature of those specified in s. 467, sentenced the prisoner to ten years' transportation.

On appeal, the High Court held that the charge should have distinctly set forth the offence as that of using a forged document of the nature of those specified in s. 467, and that, that not having been done, the trial by Jury was illegal. The conviction and sentence were, therefore, annulled, and it was directed that the prisoner should be retried.—*Reg. v. Ganga Ram Maṭi*. 6 Bom. H. C. R., 43.

S. 453.

339. Section 453 of the Criminal Procedure Code simply places a statutory limit on the number of charges which may legally form part of a single trial. There is nothing in the section, however, to prevent an accused from being separately charged and tried on the same day for any number of distinct offences of the same kind committed within the year. The *Empress* on the prosecution of *Ram Manika Chakrobutty v. Dononjoy Baraj* I. L. R., 3 Cal. 540.

S. 454.

340. Cumulative sentences cannot be passed on charges framed under ss. 411 and 414 of the Penal Code, the acts which constitute the offences being parts of one single continuous transaction.—4 Mad. H. C. R., 14.

341. A person who has been convicted of enticing away a married woman cannot be subsequently charged before another Court with adultery.—5 Mad. H. C. R., 16.

342. A person who has been tried, and convicted under s. 369 of the Penal Code of abducting a child with intent dishonestly to take moveable property cannot be subsequently tried and convicted of the theft. The bearing of s. 452 to 454 considered.—7 Mad. H. C. R., 375.

343. In a case of conviction of house-breaking by night, in order to commit theft, under s. 457, and theft, under s. 380 of Indian Penal Code, there may either be one sentence for both offences, or separate sentences for each offence, provided that the total punishment awarded does not exceed that which may be given for the graver offence. *Reg. v. Tukaya Bin Zamana*.—I. L. R., I. Bom. 214.

344. Held, that it was not illegal to convict prisoners of mischief, as well as of theft; the offences charged being that they had cut down Government trees without leave and appropriated them. *Reg. v. Narayan Krishna and another*.—2. Bom. H. C. R., 416.

345. It is competent to a Magistrate to pass a separate sentence in respect of each of the two charges, of house-breaking in order to commit theft, and of theft in a human dwelling, of which a prisoner is found guilty, provided the aggregate punishment awarded on the two charges does not exceed the punishment which the case warrants for the greater of the two offences of which the accused has been convicted, and provided further, such aggregate punishment does not exceed the jurisdiction of the Court passing the sentences. *Reg. v. Anvar Khan valad Gulkhan and another.*—9 Bom. H. C. R., 172.

346. Where the act of an accused person, coupled with his intention or knowledge, constitutes a graver offence, the circumstance that the same act also answers to the definition of another less grave offence, does not render him liable to a cumulative punishment (but to one punishment for the graver offence).

Where different statutes provide separate punishments for the same act the case is different, for in such cases, the intention of the Legislature is to guard two interests of different species, and to prevent a person who has offended against both from escaping with a penalty, provided for the offence of one only. *Reg. v. Dod Basaya and another.*—11 Bom. H. C. R., 13.

S. 455.

347. Where a person was charged before an Assistant Session Judge with (1) attempting to commit criminal breach of trust as a public servant; (2) framing as a public servant an incorrect document to cause an injury; (3) framing as such public servant an incorrect document to save a person from punishment, and was acquitted on the ground that he was not a public servant, though the Judge found that he had framed the document with a fraudulent intent.

The High Court held that the Assistant Judge ought to have convicted him of attempting to cheat under s. 455, 456, of the Code of Criminal Procedure; and as the facts which he would have had to meet on the charge were the same as he had to meet on the charge of criminal breach of trust, allowed the objection urged at the hearing, though not distinctly taken in their appeal by the Government, and ordered a retrial of the accused. *Reg. v. Ramjirav Jivbajirau.*—12 Bom. H. C. R., 1.

348. Section 455 of Act X. of 1872 applies to cases in which, not the facts are doubtful, but the application of the law to the facts is doubtful.

Judgment in the alternative cannot be passed in cases in which it is doubtful whether the accused person is guilty of any one of the several offences charged, but where it is doubtful of which of those offences he is guilty.

The accused person was committed for trial under an erroneous and untenable alternative charge under s. 193 of the Indian Penal Code. The Court of Session amended the charge under s. 193; and added charges under ss. 201 and 203.

It was doubtful whether the amendment and addition were not likely to prejudice the accused in their defence.

The alleged false evidence, and not its assumed substance and purport should be set forth in a charge under s. 193.—*Queen v. Jamurha*.—7 N.-W. P. 137.

349. K. P. M. N. and O. appellants, were convicted by the Court of Session of attempt at murder. They had previously been tried by a Deputy Magistrate on a charge of voluntarily causing grievous hurt founded on the same facts, and K. P. and M. were then acquitted, while N. and O. were convicted. N. and O. appealed to the Court of Session, and that Court, considering that the evidence showed that they had been guilty of an attempt at murder, forwarded the record to the High Court, when the conviction was quashed and a new trial ordered. The order referred expressly only to N. and O. but proceedings were commenced *de novo* against all the five persons, and they were committed to the Court of Sessions for trial on a charge of attempt at murder and convicted, as stated above, by the Court. The pleas of *auterfoits** convict, *auterfoits† acquit* could not be urged as an answer to the charge on which the appellants were convicted by any of them.—*Queen v. Punna*. 7 N.-W. P. 371.

S. 457.

350. Where a person is charged with an offence consisting of parts a combination of some only of which constitutes a complete minor offence, he may under s. 457 of the Crim. Proc. Code, be convicted of the latter without being specifically charged, but only when

* The plea of a former conviction.

† The plea of a former acquittal.

the graver charge gives notice of all the circumstances going to constitute the minor offence.

Hence where a man charged with murder was convicted of abetment of it, the High Court annulled the conviction and sentence, and ordered him to be retried on the latter charge.—*Reg. v. Chandnur and Pirbhai Adonji.* 11 Bom. H. C. R., 240.

S. 460.

351. A person who has been acquitted on charges of enticing away and adultery may afterwards be tried on a charge of theft. 5 Mad. H. C. R., 22.

S. 464.

352. The words "heads of the charge to the jury" in s. 464 Act X of 1872 must be construed reasonably and include such statement on the part of the Sessions Judge as will enable the Appellate Court to decide whether the evidence has been properly laid before the jury or whether there has been any misdirection.—23 W. R., Cr., 32.

353. A subordinate Magistrate exercising the powers of a Magistrate Full-power has no authority to vary any sentence he may have once passed on a prisoner.—*Reg. v. Tukia valad Ganuji.* 1 Bom. H. C. R., 3.

S. 466.

354. Sanction is required for the prosecution of any Judge, if a complaint is made against him as Judge. The words not removable from office without the sanction of Government refer only to public servants.—6 Mad. H. C. R., 21.

355. This section requires that sanction to prosecution therein mentioned shall be given before any such prosecution is commenced ; and, until the sanction is obtained, the tribunal by which the offence is triable has no jurisdiction, and a conviction founded on evidence taken without such sanction would be bad. A charge of extortion on a person who is one of the public servants mentioned in s. 466 does not require a sanction under that section.—*Reg. v. Parushuram Keshev.* 7 Bom. H. C. R., 61.

356. The sanction for the prosecution of a Kulkarni for making a false report as a public servant, required by s. 466 of the Code of Criminal Procedure may be given by the Mamlatdar or by the

Patil to whom such Kulkarni is subordinate. The sanction of the Collector is not necessary for that purpose.—*Reg. v. Mathar Ramchandra.* 7 Bom. H. C. R., 64.

S. 466.

357. The Local Government in sanctioning or directing a charge against a public servant has power to limit its sanction, by giving directions as to the person by whom, and the manner in which the prosecution is to be preferred and conducted ; and a Court has no jurisdiction to entertain a charge against such public servant if preferred otherwise than in accordance with such directions.

Sembler. The Local Government has power in the like case to direct that the accused public servant shall be tried before a specified tribunal, being one having jurisdiction in that behalf.

Therefore, where the sanction directed that the accused public servant should be prosecuted upon such charges as Mr. C. might be prepared to prefer against him, and there was nothing on the record to show, nor did it otherwise appear, that Mr. C. had preferred any charge against, or taken any part in the prosecution of, the accused public servant, the High Court quashed the conviction of the accused, as having been without jurisdiction.—*Reg. v. Vinayak Divakar.* 8 Bom. H. C. R., 32.

S. 467.

358. Where a person is tried for non-attendance in obedience to a summons by the Magistrate whose summons has been disobeyed ; no express sanction under this section is required.—*Reg. v. Ganu bin Tatyा Selar.* 5 Bom. H. C. R., 38.

S. 468.

359. The High Court will not be justified in exercising the discretion vested in it by s. 468 Act X of 1872 (*e. g.* to sanction a prosecution for giving false evidence) unless there be strong grounds for granting the sanction.—22 W. R., Cr., 11.

360. Prosecution for a complaint made at a Police Station does not require the sanction of any Court under s. 468 Act X of 1872.—24 W. R., Cr., 41.

361. S. 468 Act X of 1872 does not preclude prosecution of offences referred to in it without the sanction mentioned in it whenever these offences are committed not “before or against a Civil or Criminal Court”.—25 W. R., Cr., 33.

362. An application for sanction to institute a prosecution for perjury should, as a rule, be made to the Court before which the perjury is alleged to have been committed.—6 Mad. H. C. R., 92.

363. A Small Cause Court is not subordinate to a District Court so as to admit of sanction for a prosecution under s. 468 or 469 being given by the latter Court.—6 Mad. H. C. R., 191.

364. The Court before which the perjury is alleged to have been committed is to give the permission. The change of incumbent leaves it still the same Court.—7 Mad. H. C. R., 12.

365. When a complaint is presented not accompanied by the necessary sanction, it may be at once rejected as the Magistrate has no power to entertain it.—8 Mad. H. C. R., 2.

366. Where leave is granted to prosecute, under s. 469 of the Criminal Proc. Code, a witness who had appeared before a Civil Court; the accused may be tried and convicted for an offence under the provisions of s. 468.—*Reg. v. Khushal, Hiraman and Indragir.* 4 Bom. H. C. R., 28.

367. Where the Magistrate before whom a witness gives false evidence, himself commits such witness for trial, his sanction for the prosecution, under s. 468 will be implied. *Reg. v. Muhammad Khanvalad Imam Khan.*—6 Bom. H. C. R., 54.

368. Sanction for the prosecution of the accused was accorded by an Assistant Sessions Judge in the following terms :—

There is no doubt whatever that Tai, Baji, and Bala, these three persons, made before me certain statements contradictory of the statements which they had made before the Committing Magistrate. Therefore, if from such statements of theirs they may be liable to any charge, there is sanction from here. *(i. e., I give my sanction) for their prosecution.

Held that this gave sufficient sanction for the prosecution of the accused under s. 193 of the Indian Penal Code, and that it is not necessary that the authority giving the sanction should specify the particular s. of the Penal Code under which the accused is permitted to be prosecuted.—*Reg. v. Tai.* 8 Bom. H. C., R., 2.

369. Where during an inquiry into an allegation by the prisoner that the confession was induced by threats, &c., the Sessions Judge accorded his sanction to the prosecution for perjury of some of the

Witnesses who deposed on behalf of the prisoners, the High Court considered such a proceeding improper, and eminently calculated to defeat the object of the inquiry. *Reg. v. Kashinath Dinkar et. al.*—8 Bom. H. C. R., 126.

370. For the purpose of s. 468 of the Code of the Criminal Procedure (Act X. of 1872) a Magistrate of the first class is subordinate to the Magistrate of District ; a sanction given by the latter to prosecute a person for intentionally giving false evidence before the former is, therefore, legal and sufficient, notwithstanding the refusal by the former to give such sanction himself.—*Imperatrix v. Padmanabai....I. L. R., 2 Bom. 384.*

371. S. 466 of the Code of Criminal Procedure extends to all acts ostensively done by a public servant *i. e.*, to acts, which would have no special signification except as acts done by a public servant therefore a *mahalkari* charged with fabricating the proceedings of a case decided before himself, could not be tried on that charge except with the sanction specified in that section.

Paragraph one of s. 466 which mentions a sanction by Government or its deputy, is intended to apply, 'at least, chiefly to the cases of persons specially responsible to Government, such as accountants who have failed in their duty, and paragraph two, which speaks of sanction by Government alone, to persons professing to exercise certain authority, and with that pretext doing an act which is impeached by a subject on the ground of its being wholly unwarranted or of an excess or impropriety of some kind.

A *mahalkari* falls within the class of public servants contemplated in paragraph one of s. 466 ; a sanction for his prosecution by the District Magistrate is, therefore, sufficient.

For the purpose of sanctioning a criminal prosecution under s. 468 of the Code of Criminal Procedure, the Court of the Subordinate Judge is subordinate to that of the District Judge, notwithstanding that the subject matter of the litigation in the former Court involves more than Rs. 5,000, and an appeal lies direct to the High Court from the decision of that Court in that matter.

A prosecution commences when a complaint is made, the reception of the complaint being a stage of the judicial proceedings towards

conviction. *Imperatrix v. Lakshman Sakha Ram Vaman Hari and Baluji Krishna....I. L. R., 2. Bom. 481.*

372. No appeal lies to the District Judge from an order of a subordinate Court according to sanction to the entertainment of a complaint in cases in which such sanction is required by ss. 468 and 469 of Act X. of 1872.

The District Judge having reversed an appeal the order of the Subordinate Judge sanctioning the prosecution of the defendant in a suit in his Court, for an alleged false statement, the High Court set aside the Judge's order under the provisions of section 35 of Act XXIII. of 1861. In the matter of the Petition of Bulwant Rai.—6 N.-W. P. 124.

373. Held that the sanction referred to in sections 468 and 469 of Act X of 1872, when given by any Courts empowered under the Act, cannot be disturbed by a Superior Court.

Per Turner Offg. C. J. and Pearson and Oldfield, J. J.—When sanction is refused by one of the Courts, the refusal does not deprive the other Courts of the discretion given to them.

Per Spankie J.—When sanction is refused by one of the Courts, the refusal does not deprive the Superior Court of the discretion given to them. *Burkat-ul-Lah Khan v. Rennie.....I. L. R., 1 All 17.*

374. Section 471, Act X of 1872, does not deprive the Court which possesses the power of trying an offence mentioned in sections 467, 468 and 469, of the power of trying it when committed before itself. *Queen v. Gurbuksh.....I. L. R., 1 All. 193.* See No. 399.

S. 469.

See notes under s. 468.

375. The Court declined in this case to say, under s. 469, Act X. of 1872, that a conviction was bad because the Judge who tried the case, and the Judge who sanctioned the criminal proceedings was the same person.—22 W. R. Cr., 16.

376. Where a Civil Court, by letter to a Subordinate Magistrate with committing powers, gave sanction for the prosecution of the accused under s. 493 and 471 of the Indian Penal Code (making and using a false document), and where the Magistrate in com-

mitting the accused for trial, in addition to framing a charge under these sections added a head of charge under s. 193 (giving false evidence) :

It was *held* that the Magistrate had no jurisdiction to commit the accused for trial on the last mentioned head of charge.—*Reg. v. Subi Sani*. 8 Bom. H. C. R., 28.

S. 470.

377. It is very desirable that the sanction should be in writing but it is not legally imperative. When the prosecution is conducted before the authority which ought to give the sanction it may be inferred that the necessary sanction was given.—7 Mad. H. C. R., 58.

378. *Held* that where it is intended to charge a person with having made a false statement in the Court of a Magistrate or (alternatively) a false statement in the Court of a Subordinate Judge, there must be a proper sanction for a prosecution on each branch of the alternative.

A sanction for the prosecution under s. 470 must designate the Court where the false statement was alleged to have been made and the occasion on which it was committed.

It is desirable, if not necessary, that in the sanction for prosecution the description of the offence intended to be prosecuted should be stated in general terms though the details may be omitted.
In re Balaji Sitaram.—11 Bom. H. C. R., 34.

S. 471.

379. Where, under this section a case is sent up for investigation by a Magistrate, it is competent for such Magistrate to discharge the accused, if, in his opinion, the evidence against him is not sufficient to warrant their committal to the Sessions Court.—*Reg. v. Pandurang Mayral et. al.* 5 Bom. H. C. R., 41.

380. Under s. 471 Act X of 1872, the Court must first make a preliminary enquiry to satisfy itself that a specific charge coming under the sections mentioned in it ought to be preferred against the accused before it can either commit the case itself or send the case to the Magistrate for enquiry whether a committal should be made or not.—23 W. R., Cr., 39.

381. The Magistrate before whom the offence of giving false evidence is committed, may himself try and commit the person so offending.—18 W. R., Cr., 15.

382. The Magistrate's jurisdiction is not barred by s. 473 Act X of 1872, but under s. 471 he must either commit the case himself or send it for enquiry to any Magistrate having power to try or commit for trial.—22 W. R., Cr., 49.

383. But he has no authority to discharge the accused.—22 W. R., Cr., 83.

384. Although s. 16 of Act XXIII. of 1861 gives Civil Court powers similar to those conferred on Civil and Criminal Courts alike by s. 471 of the Criminal Procedure Code, the whole law as to the procedure in cases within those sections is now embodied in s. 471 of the Criminal Procedure Code.

In a suit brought to recover possession of certain property, the Judge decided one of the issues raised in the plaintiff's favor, but on the important issue as to whether the plaintiff ever had possession, he found for the defendant. The plaintiff was not examined, but on the issue as to possession he called two witnesses. The Judge disbelieved their statements, and considering that the plaintiff had failed to prove his case he gave judgment for the defendant, without requiring him to give evidence on that issue. In the concluding paragraph of his judgment, the Judge directed the depositions of the two witnesses above referred to, together with the English memoranda of their evidence to be sent to the Magistrate with a view to his enquiring whether or not they had voluntarily given false evidence in a judicial proceeding, and he further directed the Magistrate to enquire whether or not the plaintiff had abetted the offence of giving false evidence on the ground that as the witnesses were the plaintiff's servants he must personally have influenced them and also to enquire whether the plaint which the plaintiff had attested contained averments which he knew to be false. On a motion to quash this order,—*Held*, that under section 471 of the Criminal Procedure Code the Judge has no power to send a case to a Magistrate except when, after having made such preliminary enquiry as may be necessary, he is of opinion that there is sufficient ground (i. e. ground of a nature higher than mere surmise or suspicion) for directing judicial enquiry into the matter of a

specific charge, and that the Judge is bound to indicate the particular statements or averments in respect of which he considers that there is ground for a charge into which the Magistrate ought to enquire, and that the order was bad, because the Judge had made no preliminary enquiry and because it was too vague and general in its character. *The Queen v. Baijoo Lall* in the *Matter of the petition of Baijoo Lall*.....I. L. R., 1 Cal. 450.

385. S. 473 of the Code of Criminal Procedure, which, except as therein provided, forbids a Court to try any person for an offence committed in contempt of its own authority, is not limited to offences falling under Chapter X. of the Indian Penal Code, but extends to all contempt of Courts. *Reg. v. Kultaran Singh.* (I. L. R., 1 All. 129) dissented from 7 Mad. H. C. R. Ap. XVII. approved. *Reg. v. Nouranbeg Dulabeg.* (X. Bom. H. C. R., 73) followed.—*Reg. v. Parsopa Mahadevapa.* I. L. R., 1 Bom. 339.

Ss. 467, 468, 469, and 471.

386. S. 471 Act X. of 1872, does not deprive the Court, which possesses the power of trying an offence mentioned in ss. 467, 468, and 469, of the power of trying when committed before itself.—*Queen v. Gurbaksh and others.* I. L. R., 1 All. 193.

S. 472.

387. A commitment for the same offence and under the same section by the Sessions Judge was quashed, because, according to S. 472 Act X. of 1872, the offence is not one triable exclusively by the Sessions Court.—21 W. R., Cr., 37.

S. 473.

388. The Magistrate before whom the offence of giving false evidence is committed, may himself try and commit the person so offending.—18 W. R., Cr., 15.

389. The Magistrate's jurisdiction is not barred by s. 473 Act X. of 1872, but under s. 471 he must either commit the case himself or send it for enquiry to any Magistrate having power to try or commit for trial.—22 W. R., Cr., 49.

390. But he has no authority to discharge the accused.—22 W. R., Cr., 83.

391. With the exception of cases triable by the Court of Session exclusively, a Court cannot try any offence described in ss. 467, 468 and 469 of the Code of Criminal Procedure, when committed before itself.—7 Mad. H. C. R., 17.

392. The prohibition extends to the abetter as well as to the principal offender.—7 Mad. H. C. R., 28.

393. The offence of intentionally giving false evidence in a judicial proceeding cannot be tried by the Magistrate before whom the false evidence is given; this offence, being an attempt to pervert the proceedings of a Court to an improper end, is a contempt of its authority, (ss. 435, 436, 471, 472 and 473 of the Code of Criminal Procedure.)—*Reg. v. Navranbeg.* 10 Bom. H. C. R., 73.

394. A second class Magistrate, who issues an order under s. 518 of the Criminal Procedure Code, has no jurisdiction to punish for its disobedience by reason of s. 473 of the Criminal Procedure Code.—*Reg. v. Ranchod.* 10 Bom. H. C. R., 424.

395. The accused was charged with giving false evidence in the stage of a judicial proceeding. The charge was inquired into and dismissed; but the Sessions Judge ordered the accused to be committed. The accused was then committed on the same charge and was convicted by him. In an application to the High Court, it was argued on behalf of the accused

(I.) that giving false evidence being a case triable by the Court of Sessions or by a Magistrate, the Court of Sessions is not warranted in dealing it as a Sessions case and so ordering its commitment under s. 296, until the Magistrate has of his own accord (and not on account of an order by a Sessions Court) elected to commit the case.

(II.) That the alleged giving false evidence having been an offence in contempt of the authority of the Sessions Court, that Court as well as the Court of the Assistant Sessions Judge which is merely a branch of the former is precluded from trying the same.

Held. To make a case a “Sessions case” within the meaning of s. 4, it is not necessary that it should be triable exclusively by the Court of Sessions.

(Section 473 being intended to prevent a Judge from trying a case in which he has already formed an opinion) for the purposes of that section an Assistant Sessions Judge is a different Court from the

Sessions Judge. Accordingly an offence, which is committed in contempt of the Sessions Judge's authority is cognisable by an Assistant Sessions Judge.—*Reg. v. Gulabdas Kuverdas.* 11 Bom. H. C. R., 98.

396. The prohibition in s. 473 of the Criminal Procedure Code (Act X. of 1872) is a personal prohibition.—I. L. R. 1 Mad. 305.

397. An offence against public justice is not an offence in contempt of Court within the meaning of s. 473, Act X. of 1872.

But notwithstanding this the Court, Civil or Criminal, which is of opinion that there is sufficient ground for enquiring into a charge mentioned in ss. 467, 468, 469 Act X. of 1872, may not, except as is provided in s. 472, try the accused person itself for the offence charged. The case of *Sufat-ool-lah, petitioner* followed.—*Queen v. Kulta Ram Singh....* I. L. R., 1 All. 129. See No. 399.

398. An offence against public justice is not an offence in contempt of Court within the meaning of s. 473 Act X. of 1872.

The Court, Civil or Criminal, which is of opinion that there is sufficient ground for enquiring into a charge mentioned in ss. 467, 468 and 469, Act X. of 1872, is not precluded by the provisions of s. 471 from trying the accused person itself for the offence charged.—*Queen v. Jagat Mull....* I. L. R., 1 All. 162.

399. Giving false evidence is "an offence committed in contempt of the authority" of a Court within the meaning of schedule 73 of Act X. of 1872.—*Reg. v. Navran Beg.* (10 Bom. H. C. R. page 73.) and the Ruling in 7 Mad. H. C. R. Appx. XVII, followed. *Queen v. Khulta Ram Singh,* I. L. R., 1 All. 129 and *Queen v. Jagat Mull* I. L. R. 162, dissented from.

When the accused was by a Magistrate of first Class, committed for trial by the Sessions Court on a charge of having given false evidence in a judicial proceeding before the Sessions Judge, there being no Assistant Sessions Judge or Joint Sessions Judge.—Held that the commitment could not be quashed, there being no error in law, and the case must, therefore be transferred for trial to another Court of Session.

In such a case as the above the better course would be for the Magistrate to try the case himself, and, if he is incompetent to pass a sufficient sentence, for the Sessions Judge to refer the case to the High Court for enhancement of sentence.—*Queen v. Gazi Kom Raun.* I. L. R., 1 Bom. 311.

400. *Held* (Stuart C. J. dissenting,) that an offence under s. 193 of the Indian Penal Code, being an offence in contempt of Court within the meaning of s. 473 of Act X. of 1872 (See also—*Reg. v. Narwan Beg, Dula Beg*, 10 Bom. H. C. R., 73; *Reg. v. Gazi Kom Raun*, I. L. R., 1 Bom. 311; 7. Mad. H. C. R. Rulings XVII. and XVIII. On the other hand see the case of *Sufat-ool-lah*, 22 W. R. C. R. 49,) can not, under that section, be tried by the Magistrate before whom such offence is committed. *Queen v. Kulta Ram Singh*. I. L. R., 1 All. 129 and *Queen v. Jagat Mal*.—I. L. R., 1 All. 162 overruled.

Per Stuart C. J.—A Magistrate before whom such an offence is committed, if competent to try it himself, is not precluded from so doing by the provisions of s. 471 of Act X. of 1872. (*Queen v. Gur Baksh* I. L. R., 1 All. 193 and following other cases). *Empress of India v. Kashmiri Lal*.—I. L. R., 1. All. 627.

S. 474.

401. A Civil Court has no power to order the commitment of persons for offences under ss. 471, 465 and 193 Penal Code without holding the preliminary enquiry required by s. 474 Act X. of 1872.—22 W. R. Cr., 52.

402. If a Subordinate Judge sends a case triable by the Court of Session for investigation to a Magistrate of the District the latter is bound to proceed with the investigation of the case. *Reg. v. Amruta Nath*.—7 Bom. H. C. R., 29.

S. 478.

403. *Quære.* Is the formal assent of a husband to a charge of adultery added at the end of his deposition, a proper compliance with s. 478 Act X. of 1872.—24 W. R., Cr., 18.

404. The death of the husband does not necessarily put an end to a prosecution for adultery under s. 497 of the Penal Code.—4 Mad. H. C. R., 55.

S. 489.

405. There is no appeal to the Court of Session from an order made by the Magistrate, requiring a penal recognisance to keep the peace under s. 489. The Court of Session may, however, in such

case under s. 296 of the Code, call for and examine the record of the Court below; and, if it shall be of opinion that the order of the Magistrate is contrary to law, refer the proceedings for the orders of the High Court.

A conviction of house-trespass by a Subordinate Magistrate was reversed, on appeal, by the Magistrate of the District, who, moreover, directed the Subordinate Magistrate to take a recognisance bond in the sum of Rs. 50 from the accused, that he would not, for one year, enter the house, and would not commit a breach of the peace:—

Held by the High Court that the order directing the recognisance bond to be taken should be set aside, as having been improperly made by the Magistrate in the absence of the accused, and upon the suggestion of his adversary.

Semble—the order was also illegal, as not authorized by s. 280 (489, N. C.) or any other section of the Code of Criminal Procedure.—*Reg. v. Bhasker K. Kharkar.* 3 Bom. H. C. R., 1.

406. S. 491, and not s. 489, Act X. of 1872, is applicable to cases where there is only a possible apprehension of future breach of the peace.—24 W. R., Cr., 10.

407. The report of a Subordinate Magistrate although it is credible information on which a Magistrate of the District would be justified under this section in issuing a Summons, is not evidence on which he can properly arrive at a conclusion that the accused is likely to cause a breach of the peace. There must be some evidence duly taken and recorded to justify the order.—*Reg. v. Happa bin Basappa et. al.* 8 Bom H. C. R., 162.

408. It is in the power of a Magistrate, on conviction of a person of voluntarily causing hurt, to take security from him under s. 489 of Act X. of 1872.

An order under that section requiring security should not direct that the person convicted should execute the engagement to keep the peace at the end of the term of imprisonment to which he may have been sentenced. The person convicted is at liberty to execute the engagement at once or at any time during the term.—*Queen v. Bachu.* 7 N.-W. P., 328.

S. 491.

409. To constitute a proper foundation for an order under s. 491 Act X. of 1872, the Magistrate should adjudicate upon legal evidence that the person charged is likely to commit a breach of the peace, and after notice to such person of the particular conduct on his part complained of; where the ground of complaint to which such particular conduct had reference is found to be unfounded, the Magistrate cannot adjudicate upon an entirely different ground.—21 W. R., Cr., 83. See also 22 W. R., Cr., 79 (two cases); 25 W. R., Cr., 15.

The notice to the accused should give him sufficient time to come in to produce his witnesses.—22 W. R., Cr., 18. See 23 W. R., Cr., 9.

410. S. 33 Act I. of 1872 does not justify a Magistrate, when proceeding under s. 491 Act X. of 1872, in using evidence taken in a previous criminal trial in supersession of evidence given in the presence of the accused.—22 W. R., Cr., 36.

411. S. 491, and not s. 489, Act X. of 1872, is applicable to cases where there is only a possible apprehension of future breach of the peace.—24 W. R., Cr., 10.

412. Applications to set aside proceedings under s. 318 should be made without any delay.—19 W. R., Cr., 39.

413. Where a land dispute exists which is likely to lead to a breach of the peace, s. 530, and not s. 491, Act X. of 1872 applies.—24 W. R., Cr., 67.

414. Where parties are summoned to show cause why they should not be bound down to keep the peace, the proceedings should be conducted with due regard to ss. 491 and 492 Act X. of 1872, and the summons should distinctly specify the amount and nature of the security required, and the time for which the security is to run.—20 W. R., Cr., 36; 25 W. R., Cr., 50.

415. To justify an order under s. 491, there must be a reasonable probability, and not merely a bare possibility, of a breach of the peace being committed.—20 W. R., Cr., 57, 68.

416. The course prescribed by s. 491 *et. seq.* Act X. of 1872 is to be adopted in cases in which a breach of the peace may be apprehended on grounds independent of any previous proceedings; the Magistrate being bound to hear such evidence as the parties may have

to offer, and to pronounce judicially upon the same before requiring bonds or security.—22 W. R., Cr., 9. See also 24 W. R., Cr., 30. 52.

417. Where there is evidence which would justify the finding of a Magistrate that an act likely to cause a breach of the peace had been committed, the High Court will not interfere with the proceedings of the Magistrate, although no summons or order was formally issued.—4 Mad. H. C. R., 38.

418. A Magistrate can not bind a person over to keep the peace without adjudicating on evidence before him. *Queen v. Niaz Ali....* 5 N.-W. P., 80.

419. A Magistrate can not bind over a person to keep the peace where there is no evidence to show that such person was likely to commit a breach of the peace, or to do any act that might probably occasion a breach of the peace.—*Queen v. Kidar Nath....* 7 N.-W. P. 233.

S. 492.

420. Notice to show cause why security should not be demanded must be served before a Magistrate can pass orders requiring security to keep the peace.—9 W. R., Cr., 16.

421. Where parties are summoned to show cause why they should not be bound down to keep the peace, the proceedings should be conducted with due regard to ss. 491 and 492 Act X. of 1872, and the summons should distinctly specify the amount and nature of the security required, and the time for which the security is to run.—20 W. R., Cr., 36 ; 25 W. R., Cr., 50.

S. 493.

422. According to s. 493 Act X. of 1872, the means of the party, who is required to give security, and not of his master, should be looked to.—22 W. R., Cr., 74.

423. Where a security bond under s. 509 Act X. of 1872, was signed by a person under and in assumed pursuance of an order which directed that he should sign a bond under s. 493, the bond was held not to constitute a binding obligation.—23 W. R., Cr., 1.

S. 497.

424. A statement by a private person not upon oath or solemn affirmation is not credible information upon which alone a Magistrate

should issue a summons under s. 491 of the Code of Criminal Procedure.

Sembler.—A report by a Subordinate Magistrate of facts within his knowledge would be credible information upon which such summons might issue, but would not be sufficient ground for a final adjudication under s. 497.

In order to warrant an adjudication under s. 497 there should be a judicial investigation and the order should be passed upon legal evidence duly taken and recorded.—*Reg. v. Jivanji Limji.* 6 Bom. H. C. R., 1.

S. 502.

425. A Magistrate has no jurisdiction to call on a person who has entered into recognisance bond under s. 483 of the Criminal Procedure Code to keep the peace, to pay the penalty or show cause why he should not do so, without previous *prima facie* proof, by which is meant evidence on oath, that it has been forfeited.

A Police report is not sufficient to give such jurisdiction.—*In re Harisram Birbhan.*—11 Bom. H. C. R., 170.

426. Where certain persons were bound over to keep the peace and were subsequently convicted of voluntarily causing grievous hurt, and at the time of conviction the Magistrate made an order estreating their recognizances as part of his judgment in the case, without in any way fulfilling the provisions of s. 502 of Act X. of 1872, and the convictions were quashed by the Court of Sessions, the High Court cancelled the order of forfeiture.—*Queen v. Gheesu.* 7 N.W. P. 375.

S. 503.

427. This section does not authorize the imprisonment of surreties.—4 Mad. H. C. R., 68.

S. 504.

428. A Session Judge has no jurisdiction, under s. 504 Act X. of 1872 or any of the preceding sections, to decide as to the necessity for taking security for good behaviour, or without enquiry to pass orders as to the security to be furnished or as to the time it is to remain in force. The jurisdiction as to the necessity is in the Magistrate, and, after sending the accused to the Magistrate under s. 504, the Sessions Judge is *functus officio*.—24 W. R., Cr., 10.

429. Ss. 504 to 506 Act X. of 1872 contemplate that, when a conviction of an offence is contemporaneous with an order for taking security for good behaviour, the sentence for the substantive offence is to be first carried out, and the person to be bound then brought up for the purpose of being bound.—24 W. R., Cr., 13.

430. In an enquiry under this Chapter, the defendant should have an opportunity of cross-examining the witnesses produced against him, of making his own statement and of calling witnesses in his own behalf.—4 Mad. H. C. R., 22.

431. In fixing the amount of security, the Magistrate should not go beyond a sum for which there is a fair probability of the defendant being able to find security.—4 Mad. H. C. R., 46.

S. 505.

432. In making an order for security to keep the peace under s. 505 Act X. of 1872, a Magistrate has no right to impose an arbitrary condition not essential to restrain a party from the infringement of the law, e. g. a condition requiring the accused to furnish two sureties being persons of respectability and substance not related to him and residing within one mile of his house.—22 W. R., Cr., 37.

433. Ss. 504 to 506 Act X. of 1872 contemplate that, when a conviction of an offence is contemporaneous with an order for taking security for good behaviour, the sentence for the substantive offence is to be first carried out, and the person to be bound then brought up for the purpose of being bound.—24 W. R., Cr., 13.

434. An order by a Magistrate requiring security for good behaviour which directed that the security should pledge all his proprietary rights in land worth Rs. 200 was held to be illegal.—*Queen v. Ganni*....7 N.-W. P. 249.

435. On a requisition from the High Court, a Magistrate is bound to state the ground upon which he fixed the amount of security.

A person from whom security for good behavior is demanded should have a fair chance afforded him to comply with the required conditions of security.—The *Empress of India v. Didar Sircar*.—I. L. R., 2. Cal. 384.

436. If a Session Judge be of opinion that a person acquitted by him ought to give security for future good behaviour, he should discharge him and inform the Magistrate of his opinion, that security

should be taken, leaving the Magistrate to take the necessary steps for that purpose, and the Session Judge should not send the party in custody to the Magistrate.—*Reg. v. Bhaya valad Surjim et. al.* 1 Bom. H. C. R., 91.

437. Under this section a Magistrate is not justified in directing a person convicted under s. 448 of the Indian Penal Code—that the convict be brought up, at the expiration of the sentence, in order that he may give security for good behaviour for the period of one year.—*Reg. v. Krishanji B. Gaikwad.* 3 Bom. H. C. R., 39.

S. 506.

438. Ss. 504 to 506 Act X. of 1872 contemplate that, when a conviction of an offence is contemporaneous with an order for taking security for good behaviour, the sentence for the substantive offence is to be first carried out, and the person to be bound then brought up for the purpose of being bound.—24 W. R., Cr., 13.

S. 508.

439. No right of appeal lies from the order of a Sessions Court fixing a period of detention under s. 508 Act X. of 1872 for an accused party refusing to furnish security.—24 W. R. Cr., 12.

S. 509.

440. Where a security bond under s. 509 of Act X. of 1872 was signed by a person under and in assumed pursuance of an order which directed that he should sign a bond under s. 493, the bond was held not to constitute a binding obligation.—23 W. R., Cr., 1.

S. 515.

441. Evidence under Chapter XXVII. must be taken as in summons case, a separate note of each witness's deposition is required to be taken by s. 333, which is not satisfied by a statement that a witness "deposes as last witness."—*Reg. v. Bhagu valad Surjim et. al.* 1 Bom. H. C. R., 91.

442. There must be some legal evidence taken and recorded to justify a District Magistrate issuing an order requiring a person to enter into recognisance, and find security to keep the peace, as required by s. 515 of the Criminal Procedure Code.—*Reg. v. Dalpatram Pemabhai.*—5 Bom. H. C. R., 165.

S. 516.

443. The ground on which a Magistrate has power to refuse to accept any surety under s. 516 Act X. of 1872 must be a valid and reasonable ground.—22 W. R., Cr., 37.

S. 518.

444. An order passed by a Magistrate under s. 62 Act XXV. of 1861 is not of the nature of a *judicial* proceeding and cannot therefore be interfered with by the High Court under s. 404.—(F. B.) 14 W. R., Cr., 46. See 15 W. R., Cr., 56 ; 17 W. R., Cr., 37 ; 18 W. R., Cr., 22.

445. So also an order passed under s. 518 Act X. of 1872, which cannot be interfered with by the High Court under s. 297.—20 W. R., Cr., 53 ; 21 W. R., Cr., 22 ; 22 W. R., Cr., 52.

446. But if made without jurisdiction, it may be interfered with under 24 and 25 Vic. C. 104 s. 15.—22 W. R., Cr., 24, 78 ; 23 W. R., Cr., 34 ; 24 W. R., Cr., 30. See also 24 W. R., Cr., 26.

447. But proceedings under s. 308 and the other sections of Chapter XX. Act XXV. of 1861 are *judicial* within the meaning of s. 404.—16 W. R., 68. But see 16 W. R., Cr., 66.

448. A Magistrate cannot, under s. 62 Act XXV. of 1861, interfere with the civil right of a land-holder to establish *hauts* within his estate, and to hold them on any day most convenient to him.—4 W. R., Cr., 12. (Over-ruled.) See 11 W. R., Cr., 5 (affirmed by F. B.) 18 W. R., Cr., 47.

449. Similarly a Magistrate was held to have jurisdiction under s. 518 Act X. of 1872.—20 W. R., Cr., 53 ; 21 W. R. Cr., 22. See 22 W. R., Cr., 24.

450. A Magistrate of the second class having passed an order under s. 518 Act X. of 1872 for the removal of an obstruction, the Magistrate on appeal held that, though the proceedings of the Subordinate Magistrate were without jurisdiction, yet he (the Magistrate) was competent under s. 518 to direct the removal of the obstruction, and he passed an order accordingly.—*Held* that the order of the Magistrate under s. 518 was illegal, and that he should have proceeded under s. 521 *et. seq.*—21 W. R., Cr., 24.

451. Where a Magistrate, without hearing the petitioner or giving him an opportunity of being heard, and simply upon the foundation of a Police Officer's report, directed the petitioner to abstain from holding a *haut* upon his land on a certain day because another party had long been accustomed to hold a haut upon his land adjacent to the petitioner's haut on the following day.—*Held* that the Magistrate had acted without jurisdiction, the Police Officer's report being vague and insufficient, and a private interest of this kind not affording a ground for making an order under s. 518 Act X. of 1872 or any other order under that Act.—21 W. R., Cr., 26. See also 22 W. R., Cr., 24.

452. Nor does the section apply to a case which refers to the collection of market dues.—23 W. R., Cr., 57.

453. A Magistrate was held to have no jurisdiction, under s. 518 Act X. of 1872, to interfere in a case where a tree had been cut down and thrown across a small *nulla* and thereby the water passage was obstructed.—23 W. R., Cr., 34.

454. Before a prohibitory order under s. 518 Act X. of 1872 can be made, there ought to be information or evidence before the Magistrate that the act prohibited was likely to cause a riot or affray, and that the stoppage of that act would prevent such riot or affray.—24 W. R., Cr., 30.

455. A case that falls within s. 530 of the Code cannot be dealt with under s. 518 summarily.—3 Mad. H. C. R., 23.

456. Orders by Sub-Magistrates in one case directing the removal of a house on the ground that it was in a dangerous and dilapidated condition, and in the other directing the removal of a granary on the ground that it had been improperly erected upon land required to be kept unoccupied for common purposes, were set aside by the High Court because the Sub-Magistrate acted without jurisdiction.—4 Mad. H. C. R., 34.

457. An order issued by Magistrate under s. 518 of the Code of Criminal Procedure, in consequence of a Mahazarnamah signed by certain persons, but without any notice to the defendant or enquiry by the Magistrate is illegal.—4 Mad. H. C. R., 67.

458. An order to two persons directing them to remove a certain embankment where by the adjacent lands of the defendants were in

danger of being flooded is not an order which can be passed under s. 518 of the Code of Criminal Procedure.—5 Mad. H. C. R., 19.

459. An order made by a Magistrate under this section is not a judicial proceeding within the meaning of s. 297.

A Magistrate who makes an illegal order, which purports to be made under this section but is not made in accordance with its provisions, is liable to be sued in the Civil Court in respect of such order, and to be restrained by injunction from carrying it into effect.
Ashburner v. Keshav valad Tuka Patil-et-al.—4 Bom. H. C. R., 150.

460. The temple of Pandharpur, a public temple, is visited at certain periods of the year by a large concourse of pilgrims. With a view to prevent the dangers arising from overcrowding, and to improve the ventilation, the Magistrate F. P., by a written order, directed the hereditary priests of the temple to widen and heighten the door-way.

* Held that such order was legal.

Sembler—that the case would have been the same, had the temple been private property ; and also that the power of Magistrates to issue orders (under s. 518) is entirely discretionary.—*Reg. v. Ram chundra Eknath-et-al.* 6 Bom. H. C. R., 36.

461. The High Court cannot interfere, under s. 15 of the Charter Act, with orders duly passed by a Magistrate under s. 518 of the Criminal Procedure Code. In the Matter of the petition of *Chunder Nath Sein*, I. L. R., 2 Cal. 293

462. An order passed by a Magistrate under s. 518 of the Code of Criminal Procedure is not of the nature of a judicial proceeding, and is therefore, not open to revision by the High Court under s. 297. In the Matter of the petition of *Mokut Singh*, 6. N.-W. P., 16.

S. 521.

463. A magistrate of the 2nd class having passed an order under s. 518 Act X. of 1872 for the removal of an obstruction, the Magistrate on appeal held that, though the proceedings of the Subordinate Magistrate were without jurisdiction, yet he (the Magistrate) was competent under s. 518 to direct the removal of the obstruction, and he passed an order accordingly.—Held that the order of the Magistrate under s. 518 was illegal, and that he should have proceeded under s. 521 et seq.—21, W. R., Cr., 24.

464. Before issue of order by a Deputy Magistrate for the removal of a nuisance, the opposite party should be called upon to show cause why the order should not be enforced.—2 W. R., Cr., 36. See also 10 W. R., Cr., 27.

465. So as to an order under s. 521 Act X. of 1872.—21 W. R., Cr., 86.

466. With reference to ss. 521 and 526 Act X. of 1872, a Magistrate can only deal with existing and not future obstructions.—21 W. R., Cr., 10.

467. No order can be made under s. 528 Act X. of 1872 unless there is imminent danger or fear of injury of a serious kind to the public ; and where a Magistrate, who had made an order under s. 521, subsequently directed further enquiry to be made, it was held that he must be considered to have abandoned his proceedings under s. 528, and that he should have proceeded under s. 525, instead of fining the party charged under s. 188 Penal Code.—21 W. R., Cr., 86.

468. The liability to punishment under s. 188 Penal Code cannot attach to a person who comes in to show cause and submits to the judgment of the Magistrate.—26 W. R., Cr., 7.

469. A Magistrate's powers under s. 521 are confined to the instances specifically mentioned therein, and do not enable him generally to pass any order he may consider necessary for the protection of the public health.—22 W. R., Cr., 19.

470. It is only from a thoroughfare or public place that, under the above section, a Magistrate is at liberty to direct the removal of a nuisance.—22 W. R., Cr., 19. See also 25 W. R., Cr., 4, 72.

471. The petitioners, by agreeing to the appointment of a jury, cannot be taken to admit there was a *prima facie* nuisance so as to be bound by the verdict ; nor would any mistake on the part of the petitioners give power to proceed under s. 521 if the act complained of did not come within the purview of that section.—25 W. R., Cr., 72.

472. An application to have it declared that a certain place could not be used for cremation purposes, would not come under s. 521 Act X. of 1872.—24 W. R., Cr., 6.

473. S. 521 Act X. of 1872 does not authorize the removal of a prostitute from her house simply on the ground of her profession, so

long as she behaves herself orderly and quietly, and creates no open scandal by riotous living.—24 W. R., Cr., 68.

474. An order under this section is a judicial proceeding, and is therefore, open to review by the High Court under its extraordinary jurisdiction, when an error in law is committed. *Ashburner v. Keshav* (4 B. H. C. R. A. C. J. 150) on the point overruled, and (*The Collector of Hughli v. Taranath Mukhopadhyay* 7 B. L. R. 449) followed.—*Gamaprasad bin Sobharam.* 9 Bom. H. C. R., 160.

475. A Magistrate proceeding under Chapter XXIX. of the Code, must make an order according to the report of the jury. He cannot disregard such report when it is duly made. When the person to whom the order is issued has also shown sufficient cause why his house should not be removed, the Magistrate is not justified in punishing him for disobedience of the order, and in pulling down his house, while the legality of the Magistrate's order is being questioned before a superior Court.

Quare.—Whether Act XVIII. of 1850 would protect a Magistrate in such case from being sued for damages.—*Reg. v. Dalsukram Haribhai.* 2 Bom. H. C. R., 407.

S. 523.

476. A Magistrate, acting under s. 523 Act X. of 1872, should exercise his own independent discretion in selecting the members of a jury, and the persons so selected by him should not be nominees of the party interested in upholding the Magistrate's order.—21 W. R., Cr., 43.

477. Nor the complainant and his witnesses.—22 W. R., Cr., 47.

478. A Magistrate has not power, under s. 523 Act X. of 1872, to appoint a fresh jury merely because the first jury failed to send in their report.—21 W. R., Cr., 54.

479. Where a Magistrate ordered a person either to remove an obstruction to a path leading to a road or to show cause why such order should not be enforced, and subsequently, on the application of the party charged, appointed a jury under s. 523 Act X. of 1872,—*Held* that the question for the jury to try was whether the first order of the Magistrate was reasonable and proper, and for that purpose to consider whether there was a *bona fide* question between the parties as to the right of way over the land.—21 W. R., Cr., 64.

480. A Magistrate who refers a matter as to whether a pathway is a thoroughfare or not for the consideration of a jury under s. 523, is bound to make an order upon the report of the jury.—22 W. R., Cr., 86.

481. Where under s. 523 Act X. of 1872, a Magistrate receives the report of a jury, he is bound to act according to the recommendation of the majority.—25 W. R., Cr., 31.

S. 525.

482. No order can be made under s. 528 Act X. of 1872, unless there is imminent danger or fear of injury of a serious kind to the public ; and where a Magistrate, who had made an order under s. 521, subsequently directed further enquiry to be made, it was held that he must be considered to have abandoned his proceedings under s. 528, and that he should have proceeded under s. 525, instead of fining the party charged under s. 188 Penal Code.—21 W. R., Cr., 86.

483. The liability to punishment under s. 188 Penal Code cannot attach to a person who comes in to show cause and submits to the judgment of the Magistrate.—26 W. R., Cr., 7.

484. The concluding clause of this section though it prevents a Civil Court from entertaining a suit to restrain a Magistrate from carrying out an order under s. 521 or a suit against the Magistrate or any other person in carrying out such order in the manner provided by law, does not bar a person against whom such an order has been carried into effect from instituting a suit to prove that land declared by the Magistrate to be public is his private property. *Lalji Ukhuda et. al. v. Jowba Davba and the Collector and Magistrate of Khandesh.*—8 Bom. H. C. R., 94.

S. 526.

485. With reference to ss. 521 and 526 Act X. of 1872, a Magistrate can only deal with existing and not future obstructions.—21 W. R., Cr., 10.

S. 528.

486. No order can be made under s. 528 Act X. of 1872 unless there is imminent danger or fear of injury of a serious kind to the public ; and where a Magistrate, who had made an order under s. 521, subsequently directed further enquiry to be made, it was held that he

must be considered to have abandoned his proceedings under s. 528, and that he should have proceeded under s. 525, instead of fining the party charged under s. 188 Penal Code.—21 W. R., Cr., 86.

487.—The liability to punishment under s. 188 Penal Code cannot attach to a person who comes in to show cause and submits to the judgment of the Magistrate.—26 W. R., Cr., 7.

S. 530.

488. The High Court declined under s. 70 Act X. of 1872, to interfere with an order in a case under s. 530, in which the objection as to jurisdiction was not seriously taken in the Court below and in which the petitioner failed in his application to the High Court to show that he had been in any way prejudiced.—21 W. R., Cr., 88.

489. A Joint Magistrate cannot award possession under s. 318 Act XXV. of 1861 without making a formal enquiry.—2 W. R., Cr., 31 (4 R. J. P. J. 167).

See 25 W. R., Cr., 74.

490. The omission of a Magistrate to record a proceeding in a case of land dispute is not a mere informality in procedure, but renders the whole of his proceedings illegal.—4 W. R., Cr., 26. See also 16 W. R., Cr., 74 ; 17 W. R., Cr., 53 ; 25 W. R., Cr., 74.

So under s. 530 Act X. of 1872.—25 W. R., Cr., 74.

Not so under s. 283 Act X. of 1872.—22 W. R., Cr., 81.

491. When land is attached under s. 319 Act XXV. of 1861, the attachment must remain in force until the right of possession has been decided by a Civil Court in a regular suit. A certificate to collect the debts of the estate under Act XXVII. of 1860 gives no right to obtain possession.—11 W. R., Cr., 532.

492. Nor does such certificate entitle the holder to an order under s. 530 Act X. of 1872 declaring him to be in possession.—25 W. R., Cr., 16.

493. The power of a Magistrate to attach disputed land under s. 318 Act XXV. of 1861, extends to disputes as to possession of land of which rival zemindars are in possession by their ryots.—15 W. R., Cr., 1.

So also under s. 530 Act X. of 1872.—25 W. R., Cr., 18.

494. In a land dispute as to *ijmalee* property, the Magistrate has no jurisdiction to try the case under s. 318, but must proceed

ording to s. 26 Reg. V. of 1812 as modified by Reg. V. of 1827.—
W. R., Cr., 9, 33 ; 18 W. R., Cr., 36.

In like manner the Magistrate has no jurisdiction in such a case under s. 530 Act X. of 1872.—25 W. R., Cr., 2. See 25 W. R., 16.

495. What is meant by possession in s. 318 Act XXV. of 1861.
W. R., Cr., 11.

And in s. 530 Act X. of 1872.—20 W. R., Cr., 51 ; 23 W. R., 45 ; 24 W. R., Cr., 73.

496. In a case of land dispute under s. 530 Act X. of 1872, written report of an Ameen who was deputed to hold a local enquiry is not sufficient *per se* to justify an order retaining a party in possession until ousted by due course of law.—20 W. R., Cr., 57.

A Police report is sufficient under the above section.—21 W. R., 28.

497. In a case of land dispute regarding a considerable area in which both parties contended that they held possession.—*Held* that Magistrate, instead of making an order under s. 530 Act X. of 1872 that the land should remain in the possession of one of the parties until the decision of a competent Court, should have proceeded to consider the question which party was in possession of the constituent portions of the land, piece by piece.—21 W. R., Cr., 55.

498. The High Court has no authority to require a Magistrate proceed under Chapter XL. Act X. of 1872 to hold an enquiry, which is a matter entirely within the discretion of the Magistrate.—W. R., Cr., 58.

499. In a case under s. 530 Act X. of 1872, the High Court aside the proceedings of a Deputy Magistrate who, on succeeding his predecessor who had gone into the case, instead of taking the evidence *de novo* decided the question of possession on the evidence which had been taken by his predecessor.—23 W. R., Cr., 62.

500. Where a Magistrate came to a decision under s. 530 Act of 1872 that a certain party was in possession and passed an order maintaining him in possession,—*Held* that, although no particular proceeding was recorded under s. 530, yet the preliminaries therein prescribed had been substantially complied with.—24 W. R., Cr., 16. It see 25 W. R., 74.

501. Where a land dispute exists which is likely to lead to a breach of the peace, s. 530, and not s. 491, Act X. of 1872 applies.—24 W. R., Cr., 67.

502. The act of the Civil Court peon in delivering over possession of the disputed land to the auction-purchaser as part of the tenure sold in execution, does not take away, the power of a Magistrate to enquire into the question of possession between the parties under s. 530 Act X. of 1872.—25 W. R., Cr., 18.

503. Where several parties dispute about the proprietary right in a burial ground which is in the possession of a manager on behalf of them all jointly, such manager cannot constitute himself a judge of their respective rights ; and the case is one which cannot be dealt with under s. 530 or s. 532 Act X. of 1872, but only by a Civil Court.—25 W. R., Cr., 24.

504. Where a Magistrate, being in doubt as to which of two persons was rightful owner of some disputed property, attached it in order to prevent a breach of the peace, and released it on their coming to an agreement ; but subsequently re-attached it on the appearance of a third claimant, from whose attempt to obtain possession a breach of the peace was apprehended,—*Held* that the Magistrate could only order a fresh attachment after taking the preliminary steps under s. 530, if, on completion of enquiry, he found himself in the position described in s. 531 ; and that if there was any new dispute, he ought to have proceeded *de novo* ; but that the best course to pursue would be to exert his powers under Chap. XXXVII.—25 W. R., Cr., 68.

505. In a suit for possession and for establishment of title against parties in possession under an award of the Criminal authorities under s. 530, Act X. of 1872, the *onus probandi* is on plaintiff.—25 W. R., 20.

506. See No. 23.

507. In an enquiry under s. 530, Act X. of 1872, as a preliminary to an order relative to land about which there is a dispute likely to cause a breach of the peace, the evidence should be recorded by the Magistrate in the manner provided by s. 334—*Khettermonee Dassee v. Sreenath Sircar.* 11 B. L. R., 5.

508. Where there is no dispute as to the fact of actual possession of land or crop, a Magistrate cannot proceed under s. 530.—4 Mad. H. C. R., 12.

509. Proceedings under this section are judicial proceedings. Therefore, the High Court has power to interfere with an order passed by a Magistrate under it. Under this section a Magistrate is bound to inquire who is in actual possession, without regard to the question of who is legally entitled to possession, of the premises in dispute.—*Bapuji Jugjivan v. The Magistrate of Kheda.* 4 Bom. H. C. R., 153.

510. A Magistrate under this section is to inquire into the question who is in actual possession of the property in dispute without considering how that possession has been obtained.—*Dustur Husang Jumasji v. R. L. Fill.* 6 Bom. H. C. R., 30.

511. In a case of disputed possession between two rival zemindars, constructive possession through intermediate holders (*ticcadars*), to whom the ryots pay rents, is not such possession as is contemplated by s. 530 of the Code of Criminal Procedure.—The *Empress v. Thakur Dyal Singh*...I. L. R., 3 Cal. 320.

512. The inquiry contemplated by s. 530 is a personal inquiry before the Magistrate who makes the order.—4 Mad. H. C. R., 20.

513. The jurisdiction given by s. 530 to decide for a time the right to enjoyment of property should not be exercised except on clear and satisfactory proof. Where the only evidence is that of user, it should be such as to show satisfactorily acts of enjoyment exercised as a matter of right and permitted uninterruptedly for some considerable length of time.—4 Mad. H. C. R., 24.

514. In order to give a Magistrate jurisdiction to make an order regarding the possession of land under s. 530 of the Code of Criminal Procedure, he must be satisfied that there exists a dispute likely to induce a breach of the peace, and he must record the grounds of his being so satisfied. It is not sufficient that there is a mere scintilla of evidence but there must be some evidence from which the Magistrate may reasonably draw the necessary conclusion of fact. The question whether any such evidence existed is one for the consideration of the High Court.—4 Mad. H. C. R., 49.

515. Before passing an order under these sections, a full enquiry should be held, the pre-requisite of the order being that the Magistrate is unable to ascertain the fact of possession.—6 Mad. H. C. R., 4

516. The actual possession intended by these sections does not include the occupancy of a mere trespasser.—6 Mad. H. C. R., 13.

S. 531.

517. Where a Magistrate, being in doubt as to which of two persons was rightful owner of some disputed property, attached it in order to prevent a breach of the peace, and released it on their coming to an agreement ; but subsequently re-attached it on the appearance of a third claimant, from whose attempt to obtain possession a breach of the peace was apprehended.—*Held* that the Magistrate could only order a fresh attachment after taking the preliminary steps under s. 530, if, on completion of enquiry, he found himself in the position described in s. 531 ; and that if there was any new dispute, he ought to have proceeded *de novo* ; but that the best course to pursue would be to exert his powers under Chap. XXXVII.—25 W. R., Cr., 68.

S. 532.

518. The jurisdiction which is given to a Magistrate by s. 532 Act X. of 1872 is a jurisdiction which is intended for the purpose of keeping the public peace. —22 W. R., Cr., 48.

519. Where several parties dispute about the proprietary right in a burial-ground which is in the possession of a manager on behalf of them all jointly, such manager cannot constitute himself a judge of their respective rights ; and the case is one which cannot be dealt with under s. 530 or s. 532 but only by a Civil Court —25 W. R., Cr., 24.

520. An order (under s. 320 Act XXV. of 1861 or s. 532 Act X. of 1872) declaring that, as between the parties to a contention regarding a right of way over certain land, the land in dispute did not belong to the public, is not one the contravention of which can form the subject of an order under s. 188 Penal Code.—24 W. R., Cr., 20.

521. Object of s. 320 Act XXV. of 1861 in disputes concerning use of water.—6 W. R., Cr., 74. See 13 W. R., Cr., 51.

So also of s. 532 Act X. of 1872.—24 W. R., Cr., 15.

522. A right of way is a right of use of land within the meaning of section 532.—4 Mad. H. C. R., 11.

S. 533.

523. Where a local investigation under s. 533 Act X. of 1872 is instituted, it becomes part of the proceedings, and the party affect-

It is entitled to be acquainted with the results of it and to have opportunity of rebutting the deputed Magistrate's report if he thinks it necessary to do so.—21 W. R., Cr., 25.

S. 534.

524. An order s. 534 Act X. of 1872 must be founded on a finding that the person in whose favor it was made, was dispossessed of specific immovable property by the use of criminal force, and must in terms restore such person to the property from which he had been dispossessed.—23 W. R., Cr., 54.

S. 536.

525. An order for maintenance having been made under s. 536 Act X. of 1872, the plaintiff applied to have the order enforced. The defendant being called on to show cause why the order should not be enforced, divorced his wife (the plaintiff) in the presence of the Court.—*Held* that, even if such divorce made such an alteration in the circumstances as to justify the Court, on the application of the husband (the defendant), in altering the order for maintenance, yet the defendant would not be relieved from obeying the order during the time which had elapsed up to the date when and until that change of circumstances had occurred.—19 W. R., Cr., 73.

526. It cannot be said that, up to the time when the father allows his daughter to go to the house of her husband, and when, by the customs of the Hindoo society, she would probably go, the husband incurs any liability in respect of her maintenance under s. 536 Act X. of 1872.—22 W. R., Cr., 30.

527. Cases of maintenance under s. 536 Act X. of 1872, are not in the nature of summary trials, but require the usual procedure laid down for summons cases and the recording of the evidence in full as required by s. 335.—24 W. R., Cr., 61.

528. The proviso to s. 536 of Act X. of 1872, does not authorize a Magistrate to entertain an application for separate maintenance, on the ground of ill-treatment from a wife whose husband has not neglected or refused to maintain her, but who has of her own accord left her husband's house and protection, and to order an allowance to be paid to such wife on evidence of ill-treatment. In the matter of petition of *W. A. Thompson*.—6 N.-W. P. 205.

529. The wife of a Christian convert who has reverted to Hinduism and married a second wife may claim maintenance from her husband.—4 Mad. H. C. R., 3.

530. Imprisonment cannot be awarded in anticipation of default to an order made under s. 536 for payment of a monthly maintenance.—5 Mad. H. C. R., 34.

531. The issue of a warrant under this section is permissible for every breach of an order of maintenance made under that section, but there seems no ground for saying that a defendant can get out of his liability for any payment by the failure to issue a warrant for the levy of that payment. The result of issuing it for an aggregate of payments is that one month's imprisonment would alone be awardable in default.—6. Mad. H. C. R., 22 ; 7 Mad. H. C. R., 37.

532. An order of maintenance, under s. 536 of the Criminal Procedure Code, is a judicial proceeding, but no appeal lies against such order, under s. 286.—*Reg. v. Thaku bin Ira.* 5 Bom. H. C. R., 81.

533. A Magistrate of the first class has, as such, power to pass an order under the provisions of s. 536 of the Code of Criminal Procedure, notwithstanding he may not be empowered to take cognizance of offences without complaint.

The petitioner, a resident of Cawnpore, was summoned to Allahabad to answer an application for the maintenance of his children. He was ordered to make them a monthly allowance. A somewhat similar application had been made at Cawnpore, which was rejected on the ground of jurisdiction.—*Held*, that the jurisdiction of the Magistrate who disposed of the case was not barred by the circumstance of the petitioner being resident at Cawnpore, or of the former application having been rejected. *N. B. Todd. Petitioner....* 5 N.-W. P., 237.

S. 537.

534. It is open to a husband upon whom an order to make an allowance for the maintenance of his wife has been made, under s. 536, after such order has been made, to prove that his wife is living in adultery, and upon such proof a Magistrate is justified in cancelling an order made under the above section. *Chohe v. Ishvar Bhushur.*—8. Bom. H. C. R., 124.

CHAP. XXXVII.

535. Where a Magistrate, being in doubt as to which of two persons was rightful owner of some disputed property, attached it in order to prevent a breach of the peace, and released it on their coming to an agreement ; but subsequently re-attached it on the appearance of a third claimant, from whose attempt to obtain possession a breach of the peace was apprehended.—*Held* that the Magistrate could only order a fresh attachment after taking the preliminary steps under s. 530, if, on completion of enquiry, he found himself in the position described in s. 531 ; and that if there was any new dispute, he ought to have proceeded *de novo* ; but that the best course to pursue would be to exert his powers under Chapter XXXVII.—25 W. R., Cr., 68.

CHAP. XL.

536. The High Court has no authority to require a Magistrate to proceed under Chap. XL. to hold an enquiry, which is a matter entirely within the discretion of the Magistrate.—23 W. R., Cr., 58.

SCH. III.

537. A charge framed on the model given in Sch. III. Act X. of 1872, charging the accused upon two charges with having made contradictory statements in the course of judicial proceedings under s. 193 Penal Code, is a good charge ; and the Court or jury, if convicting, need not by direct evidence find which of the two statements is false ; all that is necessary being that the Court or jury should find that the allegations made in the charge are proved.—(F. B.) 21 W. R., Cr., 72. See also 22 W. R., Cr., 2.

MUNICIPAL.

538. A Municipal Commissioner, acting as a Magistrate, may enquire into a charge of the breach of a bye-law and punish the accused party by inflicting a fine; but the procedure to be followed is that of the Code of Criminal Procedure, which does not contemplate a proceeding against an absent party *ex parte*.—24 W. R., Cr., 25.

CRIMINAL PROCEEDINGS.

539. The Jailer of a District jail being accused by one of the jail clerks of falsifying his accounts and defrauding the Government, the matter was enquired into by the District Magistrate, and the Jailer was, by the Magistrate's order, placed on trial before a bench of Magistrates, consisting of the District Magistrate himself, L. the offi-

ciating Superintendent of the jail, and three other Honorary Magistrates. The prisoner and his pleaders, were alleged to have stated before the commencement of the trial on being questioned that they had no objection to the composition of the Bench, but after the charges had been framed the prisoner's counsel objected to the Bench as formed. The District Magistrate directed the Government pleader to prosecute and both the District Magistrate and L. gave evidence for the prosecution. After the case for prosecution was closed, two formal charges were drawn up, namely, that the prisoner had debited Government with the price of more oilseed, than he actually purchased and that he had received payment for certain oil at higher rate than he credited to Government. The moneys, the receipts of which were the subject of the charge, were obtained by the prisoner on the strength of certain vouchers which he had induced L. to sign as correct, and L. had sanctioned the sale at the rate credited to Government. Upon the prisoner giving the names of the witnesses he intended to call in his defence, L. was disputed by his brother Magistrates to examine some of them, who were connected with the jail, in order "to guard against deviation," and the depositions so taken were placed on the record, "to be used by either party, though not themselves as evidence." The prisoner was convicted. On a motion to quash the conviction,

Held, that L. had a distinct and substantial interest which disqualified him from acting as Judge.

Held, that further, although a Magistrate is not disqualified from dealing with a case judicially, merely, because in his character of Magistrate it may have been his duty to initiate the proceedings, yet a Magistrate, ought not to act judicially in a case where there is no necessity for his doing so, and where he himself discovered the offence and initiated the prosecution and where he is one of the principal witnesses for the prosecution.

Held, further, that the recording the statements of the prisoner's witnesses was irregular.

Criminal proceedings are bad unless they are conducted in the manner prescribed by law, and if they are substantially bad, the defect will not be cured by any waivers or consent of the prisoner.—*Reg. v. Bhola Nath Sen. ...I. L. R., 2 Cal., 23.*

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THE
LEGAL COMPANION.

MAY, 1881.

CALCUTTA HIGH COURT.

THE 21ST FEBRUARY, 1881.

Before Mr. Justice Mitter and Mr. Justice Maclean.

IN THE MATTER OF JUBDUR KAZI(1) AND GOLAB KHAN.

THE EMPRESS v. JUBDUR KAZI AND GOLAB KHAN.

Practice—Cumulative Sentence—Separate Charges—Criminal Procedure Code (Act X of 1872), s. 454, illus. (f)—Penal Code (Act XLV of 1860), ss. 147, 148, and 324.

Under s. 454 of the Criminal Procedure Code, the collective punishment awarded under ss. 147, 148, and 324 of the Penal Code, must not exceed that which may be awarded for the graver offence.

Quare.—Whether separate convictions under ss. 147 and 324 of the Penal Code are legal?

THESE two appeals arose out of the same trial. The prisoners Jubdur Kazi and Golab Khan having been members of an unlawful assembly, some of whom were armed with spears and shields, and some with lathees, which took place on the 12th Kartick 1256, corresponding with the 28th October 1879, and resulted in the death of one man named Guru Churn, and in severe injury to another named Babul Chund. The prisoners were charged, along with others, on several charges under the Indian Penal Code, but the Sessions Judge, concurring with the assessors, acquitted Jubdur Kazi of the graver charges under s. 302 and s. 304, and Golab Khan of those under s. 324 and s. 326; but convicted them both under s. 148 and also under s. 149, coupled with s. 324, and sentenced them each, under s. 148, to three years' rigorous imprisonment; and further, under s. 149, coupled with s. 324,

(1) I. L. R., 6 Calc., 718.

to a further term of two years' rigorous imprisonment, to commence on the expiry of the former sentence; and further, sentenced the first prisoner Jubdur Kazi, under s. 148, to pay a fine of Rs. 200, or in default to suffer a further term of six months' rigorous imprisonment. Against these sentences both the prisoners appealed to the High Court.

Mr. L. M. Ghose and Baboo Boido Nath Dutt, for the appellant, Jubdur Kazi.

Baboo Juggadanund Mookerjee, for the Crown.

No one appeared on behalf of the other appellant, Golab Khan.

The judgment of the Court (MITTER and MACLEAN, JJ.,) was delivered by

Mitter, J.—These appeals arise out of the same trial. The appellants have been convicted of being members of an unlawful assembly, in which one Guru Churn received fatal injuries, and one Babul Chund was less severely hurt.

It seems that they were acquitted of any offence as respects the death of Guru Churn, the conviction being for rioting armed with deadly weapons under s. 148, and for hurt caused to Babul Chund under s. 324, read with s. 149 of the Penal Code, the periods awarded being three years under s. 148, and two years under ss. 149 and 324.

The learned counsel who appeared for Jubdur Kazi, appellant in No. 22, confined himself to urging that the sentences passed upon his client were in excess of what could be passed according to law, and that the injuries caused to Babul Chund by one of the members of the unlawful assembly, not found to be his client, were not caused in prosecution of the common object of the assembly.

The learned counsel's contentions apply equally to the case of Golab Khan, for whom, however, he did not appear.

The first point turns upon s. 454 of the Criminal Procedure Code, which provides for collective punishment either for one offence falling within two separate definitions of law, or for acts severally constituting more than one offence, but collectively coming within one definition. In the former case one punishment, and in the latter separate punishments, may be awarded; but in the former case it must not exceed what can be awarded for either offence, and

in the latter they must not collectively amount to more than could have been awarded for any one of the several offences, or for the combined offence. Illustration (*f*), which is referred to by the Judge, shows that offences under ss. 147, 324, 152, may be separately dealt with.

In this case the conviction is for offences under ss. 147 and 324, and this Court has held that separate convictions under those sections are not legal : *vide* the case of *Queen v. Durzoola* (1). There is, however, a contrary ruling in the case of *Queen v. Callachand* (2), followed apparently in *Empress v. Ram Adhin* (3); but whether there can be separate convictions or not, it is certain that, under s. 454, Criminal Procedure Code, the collective punishment must not exceed that which may be given for the graver offence : *Reg. v. Tukaya Bin Tamana* (4).

We shall, therefore, reduce the sentences on these appellants to three years in each case.

It is not necessary to discuss the second question raised in the appeal of Jubdur Kazi.

Sentence modified.

CALCUTTA HIGH COURT.

THE 28TH FEBRUARY, 1881.

Before Mr. Justice Cunningham and Mr. Justice Prinsep.

DEELA MAHTON (5) vs. SHEO DYAL KOERI.

Evidence—Summoning Witnesses—Refusal of a Magistrate to summon Prisoner's Witnesses—Criminal Procedure Code (Act X of 1872), s. 359.

A Magistrate is not at liberty to refuse to summon a witness tendered by an accused person, except in the grounds specified in s. 359 of the Criminal Procedure Code; and if he does refuse, he is bound to proceed under that section. The fact that the accused declines to examine a witness is no reason for refusing to summon him to meet fresh evidence given subsequent to the defence being closed.

MR. R. E. TWIDALE appeared for the petitioner on this motion.

The facts of this case appear sufficiently, for the purposes of this report, from the judgment of the Court (CUNNINGHAM and PRINSEP, JJ.), which was delivered by

(1) 9 W. R., Cr., 83.

(2) 7 W. R., Cr., 60.

(3) I. L. R., 2 All., 139.

(4) I. L. R., 1 Bomb., 214.

(5) I. L. R., 6 Calc., 714.

Cunningham, J.—We think that the Magistrate was not at liberty to refuse to summon the witnesses tendered by the accused, except on the grounds specified in s. 359 of the Code of the Criminal Procedure; and that if he did refuse on those grounds, he ought to have proceeded under that section. The fact that the accused stated that they did not wish to examine those witnesses when the case closed, was no reason for refusing to summon them to meet fresh evidence which had been taken by the Magistrate after hearing the arguments on behalf of the defence. We must, accordingly, direct that the proceedings be recommenced from that stage, and that the Magistrate do either take the evidence or record his reasons for not doing so, and proceed as directed by law.

Case remanded.

HIGH COURT, N.-W. P.

THE 7TH AUGUST, 1880.

Before Mr. Justice Pearson.

EMPEROR vs. GURDU(1) and another.

Omission to prepare charge—Acquittal—Discharge—Revival of Prosecution—Act X of 1872 (Criminal Procedure Code), ss. 216, 220, 298.

A Magistrate tried and acquitted a person accused of an offence without preparing in writing a charge against him. Such omission did not occasion any failure of justice. Held, with reference to s. 216 of Act X of 1872, Explanation I, that such omission did not invalidate the order of acquittal of such person, and render such order equivalent to an order of discharge, and such order was a bar to the revival of the prosecution of such person for the same offence.

THIS was an application to the High Court for the revision, under s. 297 of Act X of 1872, of the order of Mr. J. Kennedy, Magistrate of the Ghazipur District, dated the 3rd June, 1880, convicting the petitioners of theft, an offence punishable under s. 379 of the Indian Penal Code, and sentencing them to rigorous imprisonment for four months. The petitioners were originally accused of the theft before a Magistrate subordinate to Mr. J. Kennedy. The Subordinate Magistrate, after taking the evidence of the witnesses for the prosecution and for the defence, on the 22nd April, 1880, without having prepared in writing a charge against the

(1) I. L. R., 3 All., 129.

petitioners, determined the case in their favor. He concluded his judgment in the case in these terms :—“ I find the accused, Gurdu and Birju, not guilty, and hereby acquit them.” The District Magistrate, being of opinion that the Subordinate Magistrate had misappreciated the evidence against the petitioners, re-instituted proceedings against them, and on the 3rd June, 1880, convicted them of the theft. In his judgment, the District Magistrate expressed his opinion that the order of the Subordinate Magistrate was not, with reference to s. 220 of Act X of 1872, an order of acquittal, but an order of discharge, inasmuch as the Subordinate Magistrate had omitted to prepare in writing a charge against the petitioners ; and that such order, therefore, did not bar the revival of the prosecution of the petitioners.

The grounds on which revision was sought were that the omission of the Subordinate Magistrate to prepare in writing a charge against the petitioners did not invalidate his order of acquittal, and that, as the petitioners had been previously acquitted of the theft by a competent Magistrate, the Magistrate of the District had no jurisdiction to try them again for that offence.

Mr. Colvin, for the petitioner.

The Junior Government Pleader (*Baboo Dwarka Nath Banerji*), for the Crown.

Pearson, J..—The proceedings of the Officiating Magistrate of the District are altogether unwarrantable. The basis of them was an application made to him under s. 298, Act X of 1872 ; but under the provisions thereof, if he was of opinion that the Deputy Magistrate's judgment or order was contrary to law, or that the punishment awarded by that officer was too severe or inadequate, the proper course was to report the proceedings for the orders of the High Court. But that section does not authorize the Magistrate himself to set aside the sentence of a Subordinate Court, or recognise as a ground of interference a difference of opinion as to the value of the evidence recorded in the case.

The Officiating Magistrate is also wrong in holding that the accused had not been acquitted by the Deputy Magistrate on the charge on which he has tried them. The Deputy Magistrate's judgment of the 22nd April last concludes with these words :—“ I find the accused, Gurdu and Birju, not guilty, and hereby acquit them.” The Magistrate, in advertence to the Explanation given

under s. 220 of the Code, wherein it is said that "if no charge is drawn up, there can be no judgment of acquittal or conviction," holds the Deputy Magistrate's judgment not to be a legally valid judgment of acquittal, because no charge was drawn up in the case disposed of by the latter. But the rule, that, if no charge is drawn up, there can be no judgment of acquittal or conviction, is subject to the exception of cases provided for in Explanation I to s. 216 of the Code. That Explanation is that the omission to prepare a charge shall not invalidate a charge, if in the opinion of the Court of appeal or revision no failure of justice has been occasioned thereby. In the case decided by the Deputy Magistrate, although a charge may not have been formally drawn up, the accused were called upon to answer to the charge preferred against them by the complainants. There is no pretence for saying that any failure of justice was occasioned by the omission to draw up a formal charge; nor was that the ground on which the application under s. 298 was preferred to the Officiating Magistrate, or on which he proceeded to re-try the accused. The alleged misappreciation of evidence by the Deputy Magistrate was the ground of the Officiating Magistrate's proceedings. Those proceedings being illegal by reason of the previous acquittal of the accused on the same charge are hereby cancelled, the sentence passed by the Officiating Magistrate on the petitioners is annulled, and their immediate release is ordered.

HIGH COURT, N.-W. P.

THE 26TH AUGUST, 1880.

Before Mr. Justice Oldfield and Mr. Justice Straight.

EMPEROR vs. DOSABHOY FRAMJI (1) and others.

*Act III of 1880 (Cantonments Act), s. 14—"Soldier"—Sub-Conductor—
Sale of spirituous liquor.*

A Sub-Conductor in the Commissariat Department is not a "soldier" within the meaning of s. 14 of Act III of 1880; and consequently the sale of spirituous liquor to the wife of such a person without the license required by that section is not an offence against that section.

THIS was a reference to the High Court, under s. 296, Act X of 1872, by Mr. W. Young, Sessions Judge of Bareilly. It appeared from the Sessions Judge's referring letter that on the 12th June,

1880, the Cantonment Magistrate of Bareilly had convicted and punished with fines one Dosabhoi Framji and one Ghulam Husain for offences against s. 14 of Act III of 1880, in that they had sold liquor to the wife of a European Sub-Conductor of the Commissariat Department, without the written license required by that section. The Sessions Judge was of opinion that these convictions were contrary to law, inasmuch as the term "European soldier," in s. 14 of Act III of 1880, did not include a Sub-Conductor of the Commissariat Department. The Sessions Judge observed in his referring letter as follows:—"There is no definition of the term 'European soldier' in the said Act III of 1880, and we have to search elsewhere for illustration. In common parlance the word 'soldier' is used to denote every person in the army from the Commander-in-Chief to the latest recruit, and also comprehends many who have long ago either definitively or conditionally renounced military life for civil pursuits. It is, I think, obvious that *this* is not the meaning contemplated by the use of the words 'European soldier' in s. 14, Act III of 1880, but they bear some less comprehensive meaning. By (e), Interpretation Clause of Act V of 1869, 'The Indian Articles of War,' it is laid down that 'soldier and soldiers include non-commissioned officers, and all armed persons doing duty in the ranks of the army.' But it is to be observed that this definition does not include 'warrant-officers,' and Mr. Little is a warrant-officer. This omission cannot be accidental, for only a few lines previously the same Act (V of 1869) contains a specification of persons to whom certain articles shall apply, and therein (*vide* Part I (d) of the said Act) warrant-officers are distinctly named as a class by themselves separate from non-commissioned officers, whose place in the list follows directly after them. Warrant-officers are of a grade as distinct from non-commissioned officers as are commissioned officers. Their duties, privileges, responsibilities, are all distinct from those of non-commissioned officers, and Mr. Little is not an armed person, doing duty in the ranks. He wears no uniform, does not live in barracks, does not attend muster. To continue. If the provisions of the 'Mutiny Act' (41 Vic., c. 10) are considered, we find that there is a general clause declaring that in its interpretation 'all powers and provisions relating to soldiers shall be construed to extend to non-commissioned officers unless when otherwise provided.'—*Vide* s. 67,

Matiny Act. Here again the scope of the Act is not extended as far as warrant-officers, but only to non-commissioned officers. As far as the facts before me go, I do not think that there is good warranty for the extension of the term 'European soldier' in s. 14, Act III of 1880, so as to include by it 'warrant-officers,' as has been done by the Cantonment Magistrate. If the view then which I take is correct, the fines imposed by the lower Court were illegal."

Mr. Chatterji, for Dosabhoy Framji.

The Junior Government Pleader (Baboo Dwarka Nath Banerji), for the Crown.

The judgment of the Court (OLDFIELD, J., and STRAIGHT, J., was delivered by

Straight, J.—We are of opinion that the views expressed by the Sessions Judge in his referring letter are correct, and that a Sub-Conductor in the Commissariat Department is not a "soldier" within the meaning of s. 14, Act III of 1880. The two orders passed by Mr. Petre on the 12th of June last must therefore be quashed, and the fines, if they have been paid, returned.

HIGH COURT, N.-W. P.

THE 13TH AUGUST, 1881.

Before Mr. Justice Pearson.

EMPEROR(1) vs. BAKSHI RAM and others.

Landholder, duty of—Neglect to aid a public servant—Disobedience to order by public servant—Act X of 1872 (Criminal Procedure Code), ss. 90, 91—Act XLV of 1860 (Penal Code), ss. 187, 188.

A Magistrate directed a landholder "to find a clue" in a case of theft "within fifteen days, and to assist the Police." Held, that such order was not authorized by ss. 90 and 91 of Act X of 1872, and the conviction of such landholder, under ss. 187 and 188 of the Penal Code, for disobedience to such order, was not maintainable.

This was an application to the High Court for the revision, under s. 297 of Act X of 1872, of the order of the Magistrate of the Agra District, Mr. A. J. Lawrence, dated the 31st May, 1880, affirming on appeal the order of Munshi Raja Lal, Magistrate of the second class, dated the 26th April, 1880, convicting the peti-

tions of offences under ss. 187 and 188 of the Indian Penal Code.

It appeared that on the 21st January, 1880, the ornaments on the top of two of the domes of buildings in the Sikandra Bagh at Agra were stolen. The Police reported to the Magistrate concerned that several similar thefts had previously taken place, but none of the zemindars of the villages in the neighbourhood of the Sikandra Bagh had taken any steps to discover the offenders, and they requested the Magistrate, Mr. J. P. Hewett, to issue an order to the zemindars to assist the Police in obtaining a clue to the discovery of the thieves on the present occasion. The Magistrate, accordingly, on the 24th January, 1880, issued an order to the petitioner Bakhshi Ram, lambardár and zemindar of mauza Sikandra, and to the petitioners Mithu Lal and Ganga Ram, lambardárs and zemindars of mauza Gailana, and to certain other persons, lambardárs and zemindars of other villages in the neighbourhood of Sikandra Bagh, directing them "to get a clue of the case within fifteen days, and to give sufficient assistance to the Police." On the complaint of the Police, "that the petitioners had given them no assistance, but on the contrary, abstained from so doing, and had neglected to perform their duty intentionally for the purpose of spoiling the case," the petitioners were charged before Munshi Raja Lal with omitting to assist public servants in the execution of their duty when bound by law to do so, and with disobedience to an order duly promulgated by a public servant, offences respectively punishable under ss. 187 and 189 of the Indian Penal Code, and were convicted of those offences and fined. On appeal by the petitioners the Magistrate of the District affirmed the convictions, observing in his decision that it was proved that the petitioners had not assisted the Police, and ss. 90 and 91 of Act X of 1872 seemed to authorize the orders issued by Mr. J. P. Hewett, which the petitioners had not obeyed.

The grounds on which revision was sought were that, as the order of Mr. J. P. Hewett of the 24th January was illegal, the petitioners were not bound to obey it, and were not punishable under ss. 187 and 188 of the Penal Code for disobeying it, and not rendering assistance to the Police.

Mr. Colvin, for the petitioners.

The Junior Government Pleader (Babu Dwarka Nath Banerji), for the Crown.

The portion of the judgment of the Court material to the purposes of this report was as follows :—

Pearson, J.—The processes issued by Mr. Hewett on the 24th January last to Bakhshi Ram and others of Sikandra, and to Mitbu Lal and others of Gailana, requiring them to find a clue in a case of theft within fifteen days, were wholly unwarranted by law, and the Magistrate of the District is wrong in holding them to have been authorized by the provisions of ss. 90 and 91, Act X of 1872. The conviction of the petitioners under ss. 187 and 188 of the Indian Penal Code is altogether indefensible, and is accordingly set aside, and the sentences passed on them by the Native Magistrate are annulled, and any fines which may have been realized thereunder are ordered to be refunded.

The duties of landholders are defined in ss. 90 and 91, Act X of 1872, which do not require them to perform the duties for which the Police are appointed and paid. S. 90 requires them to give to the Police any information they may obtain of the matters specified in clauses *a*, *b*, *c*, and *d*. S. 91 requires them to assist a Magistrate in certain specified cases. The orders issued by Mr. Hewett were not, as I have already observed, warranted by either section; nor were the petitioners legally bound to attend upon the Police for the purpose of carrying out that order.

Application allowed.

HIGH COURT, N.-W.-P.

THE 6TH AUGUST, 1880.

Before *Mr. Justice Straight.*

EMPEROR (1) vs. SHITA RAM RAI.

Abetment of Theft—Receiving stolen property—Joint undivided Hindu family—Act XLV of 1860 (Penal Code), ss. 379, 411.

A Hindu, intending to separate himself from his family, emigrated to Demerara as a coolie. After an absence of thirty years he returned to his family, bringing with him money and other moveable property which he had acquired in Demerara by manual labour as a coolie. On his return to his family, he lived in commensality with it, but he did not treat such property as joint family-property, but as his own property. Held, that such property was his sole property, and his brother was not a joint owner of it, and could properly be convicted of theft in respect of it.

It is irregular to convict and punish a person for abetment of theft, and at the same time to convict and punish him for receiving the stolen property.

(1) I. L. R., 3 All., 181.

IN 1879, one Tunsi returned from Demerara to his native village in the Ballia district, after an absence of thirty years, bringing with him property, consisting chiefly of Government currency notes, to the value of Rs. 6,000, which he had acquired in Demerara by his labour as a coolie. His father was dead when he returned, but his mother and his two younger brothers, named respectively Dalmir and Jhingur, were alive, and living together in the family-house. Tunsi and his wife, who had also returned with him, resided in the family-house with his mother and his brothers, and their wives, the whole family living in commensality. The whole family lived peacefully together until Dalmir began to annoy Tunsi with demands for his share of the property which Tunsi had brought from Demerara, insisting that, as they were a joint Hindu family, he was entitled to his share of such property. Tunsi refused to accede to these demands, and on their being persisted in, he declined to eat with his brother, and eventually determined to return to Demerara. Shortly before his intended departure in January 1880, Dalmir, in the absence of his brother Tunsi, entered the house, and brought out from it the box containing the property, Debi Singh and Sita Ram, the zemindars of the village, standing at the door of the house while Dalmir was bringing out the box. When it was brought out, the three persons departed together with it. Sita Ram subsequently restored to Tunsi currency notes aggregating in value Rs. 1,100, and a currency note belonging to Tunsi was afterwards found in his house. Upon these facts the Sessions Judge of Ghazipur, Mr. J. W. Power, convicted Dalmir, under s. 380 of the Penal Code, of theft in a building, Debi Singh, under ss. 109 and 380 of that Code, of the abetment of that offence, and Sita Ram, under ss. 109 and 380 and s. 411 of that Code, of the abetment of that offence, and of dishonestly receiving stolen property. The Sessions Judge observed in his decision with reference to Debi Singh and Sita Ram as follows :—"Debi Singh pleads not guilty to the charge. There is, I must admit, no evidence to show that he had concealed any of the stolen property, but there is abundant evidence on record to show that he stood by when the box was removed from complainant's house, and that he knew that Dalmir had stolen it, not having any right to it. He therefore abetted the offence of theft. Sita Ram also pleads not guilty to the charge, but he admits receiving the box from Dalmir, and the evidence on record shows

that he was present with Debi Singh when the box was stolen ; that he made over to Jhingur a sum of Rs. 1,100 in notes, knowing them to have been stolen ; that he told the Police he would point out the stolen property ; that a ten-rupee note belonging to complainant was found in his house under very suspicious circumstances ; and that several other notes were found concealed on the information of his servant Gobind. I consider, therefore, two offences have been proved against Sita Ram—first, abetment of theft, and second, concealment of stolen property."

Sita Ram Rai appealed to the High Court.

Mr. Hill, for the appellant, contended that, Tunsi and Dalmir being members of a joint Hindu family, the property acquired by Tunsi was jointly owned by Dalmir, and the latter committed no offence by taking it, and the appellant, therefore, committed no offence by aiding in such taking or by receiving such property. The appellant, if guilty of an offence, is guilty of theft, and not of abetment of theft. The appellant has been irregularly convicted and punished for abetment of stealing and receiving the same property. He referred to *Jacobs v. Seward* (1) ; Mayne's Commentaries on the Penal Code, 10th ed., 307 ; *Chalakonda Alasani v. Chalakonda Ratnachalam* (2) ; *Durvasula Gangadharudu v. Durvasala Narasammah* (3) ; Russell on Crimes, 4th ed., vol. i, p. 50.

The Junior Government Pleader (Babu Dwarka Nath Banerji), for the Crown.

Straight, J.—The appellant, Sita Ram Rai, was tried by the Sessions Judge of Ghazipur, in conjunction with two persons named Dalmir and Debi Singh, upon a charge of abetment of stealing certain valuable securities in cash in the dwelling-house of one Tunsi, a brother of the accused Dalmir, and also for receiving the said property. Dalmir was convicted of the stealing, and Debi Singh and the appellant, of abetting him ; a further conviction being recorded against the latter under s. 411 of the Penal Code. The points taken by the learned counsel for the appellant are, first, that, Tunsi and Dalmir being members of a joint undivided Hindu family, Dalmir was a joint owner of the notes and cash taken by him, and therefore cannot be convicted of stealing ; secondly, that it is irregular to convict a person and punish him for abetment

(1) *L. R.*, 4 C. P., 328. (2) 2 Mad. H. C. R., 56.
(3) 7 Mad. H. C. R., 47.

of stealing, and for receiving the same property. The first of these objections appears to have no force. It is not necessary for me now to determine the point; but I am by no means prepared to say that, under certain circumstances and facts, it might not be competent to charge one member of an undivided Hindu family with theft or criminal misappropriation of family-property; but the consideration of this question does not arise in the present case, in which, whatever may be the presumption as to Tunsi and Dalmir being members of a joint Hindu family, the evidence entirely negatives any such presumption. It is clear to my mind that Tunsi altogether separated himself when he went to Demerara thirty years ago, and that he had no intention, when he returned to India early in 1879, to appropriate his savings as a common fund for the purposes of his family. His whole conduct shows that he treated the notes and money as his own, and in no way contemplated giving his relations a common interest with himself in them. I do not agree with Mr. Hill that the presumption of law is to the contrary. The Madras cases quoted by him no doubt go a long way in favour of his contention, but the soundness of their authority is by no means unquestioned, and, I confess, with the greatest respect for the Court that decided them, I should hesitate before implicitly following them. In the present case it may further be remarked that Tunsi does not appear to have been provided with any exceptional advantages of education or maintenance from joint family funds, and his self-acquisitions by manual labour as a coolie cannot be credited to any special outlay made from them on his behalf. In my opinion, therefore, the notes and cash taken were the sole property of Tunsi, and Dalmir has rightly been convicted under s. 380 of the Penal Code. I also think that the appellant Sita Ram Rai and Debi Singh would have been more properly convicted of stealing than of abetment, for the evidence clearly shews them to have been principals to and participants in the dishonest removal of the property from the dwelling-house of Tunsi by Dalmir. I accordingly direct that the record be amended, and that the convictions of Sita Ram Rai and Debi Singh be entered as under s. 380 of the Penal Code. The second objection urged by Mr. Hill has force, and I accordingly quash the conviction and sentence upon Sita Ram Rai under s. 411 of the Penal Code. The sentence passed by the Sessions Judge for the offence of abetment will stand against him as for the substantive offence under s. 380.

PRINCIPLES OF THE PENAL CODE.

[As laid down by the original framers before the Governor-General of India in Council in the year 1837.]

ON OFFENCES AGAINST THE BODY.

(Continued from page 115.)

THE second mitigated form of voluntary culpable homicide is that to which we have given the name of voluntary culpable homicide by consent. It appears to us that this description of homicide ought to be punished, but that it ought not to be punished so severely as murder. We have elsewhere given our reasons for thinking that this description of homicide ought to be punished.*

Our reasons for not punishing it so severely as murder are these. In the first place, the motives which prompt men to the commission of this offence are generally far more respectable than those which prompt men to the commission of murder. Sometimes it is the effect of a strong sense of religious duty, sometimes of a strong sense of honor, not unfrequently of humanity. The soldier who, at the entreaty of a wounded comrade, puts that comrade out of pain, the friend who supplies laudanum to a person suffering the torment of a lingering disease, the freedman who in ancient times held out the sword that his master might fall on it, the high-born native of India who stabs the females of his family at their own entreaty in order to save them from the licentiousness of a band of marauders, would, except in Christian societies, scarcely be thought culpable, and even in Christian societies would not be regarded by the public, and ought not to be treated by the law as assassins.

Again, this crime is by no means productive of so much evil to the community as murder. One evil ingredient of the utmost importance is altogether wanting to the offence of voluntary culpable homicide by consent. It does not produce general insecurity. It does not spread terror through society. When we punish murder with such signal severity, we have two ends in view. One end is that people may not be murdered. Another end is that people may not live in constant dread of being murdered. This second end is perhaps the more important of the two. For if assassination

* See Note B.

were left unpunished, the number of persons assassinated would probably bear a very small proportion to the whole population. But the life of every human being would be passed in constant anxiety and alarm. This property of the offence of murder is not found in the offence of voluntary culpable homicide by consent. Every man who has not given his consent to be put to death is perfectly certain that this latter offence cannot at present be committed on him, and that it never will be committed, unless he shall first be convinced that it is his interest to consent to it. We know that two or three midnight assassinations are sufficient to keep a city of a million of inhabitants in a state of consternation during several weeks, and to cause every private family to lay in arms and watchmen's rattles. No number of suicides, or of homicides committed with the unextorted consent of the person killed, could possibly produce such alarm among the survivors.

The distinction between murder and voluntary culpable homicide by consent has never, as far as we are aware, been recognized by any Code in the distinct manner in which we propose to recognize it. But it may be traced in the laws of many countries, and often, when neglected by those who have framed the laws, it has had a great effect on the decisions of the tribunals, and particularly on the decisions of tribunals popularly composed. It may be proper to observe that the burning of a Hindoo widow by her own consent, though it is now, as it ought to be, an offence by the regulations of every Presidency, is in no Presidency punished as murder.

CALCUTTA HIGH COURT.

THE 9TH JULY, 1880.

Before Mr. Justice Tottenham and Mr. Justice Field.

EMPEROR vs. CHEDI RAI.

C. C. P. (Act X of 1872), s. 297—Acquittal, practice of High Court as to revision of.

It is not the practice of the High Court to interfere, by way of revision, under C. C. P., s. 297, with an acquittal, against which the Government may appeal.

CRIMINAL Reference submitted by the Officiating Magistrate of Shahabad, in respect of an acquittal on a charge of perjury.

The following order was made by the High Court:—

It is not the practice of this Court to interfere, by way of revision, under s. 297 of the Code of Criminal Procedure, with an acquittal against which the Government can appeal, if so advised. We must decline to interfere.

CALCUTTA HIGH COURT.

THE 16TH JULY, 1880.

Before Mr. Justice White and Mr. Justice Field.

GOGAN CHUNDER GHOSE vs. THE EMPRESS.

Evidence—Judgment of Civil Court, directing a prosecution, how far admissible in the Criminal Court.

In a civil suit to recover money upon a bond, the Munsif was of opinion that the signatures of two of the defendants on the bond had been forged, and he dismissed the suit directing a prosecution to be instituted against the plaintiff for forging the bond and using it as genuine knowing it to be forged.

At the trial by the Criminal Court, the judgment of the Munsif was received in evidence and read out to the Jury.

Held, that the judgment in the civil suit had been improperly received inasmuch as the judgment was a mere opinion of the Munsif, and not a decision on the question of forgery, and as the parties thereto and the issues in the Civil and Criminal Court were not identical, and the burden of proof in each case was on different shoulders.

White, J.—This is an appeal by the prisoner Gogan Chunder Ghose against a conviction under s. 471 of the Code, and a sentence of five years' rigorous imprisonment.

The circumstances out of which this prosecution arose are these: The prisoner had brought a suit against Bansheeram Mondle, and his two brothers, Babooram and Dharani Dhar Mondle, for the recovery of Rs. 726, being the amount of principal and interest due upon a kistbundi bond alleged to have been executed in favor of the prisoner by the three brothers.

The Munsif found that the bond had been executed by one of the three, Dharani Dhar, but dismissed the suit, because he was of opinion that the signatures of the other two defendants, Bansheeram and Babooram, were forged, and he entertained so strong an opinion upon this point, that he directed this prosecution, which we are now considering to be instituted against the prisoner for forging the kistbundi, and using it as genuine, knowing it to be forged.

The case has been tried by a jury, and they have come to a unanimous verdict, that the prisoner is guilty of using this bond knowing it to be forged ; and in answer to a question, they said that they found the signatures of Bansheeram and Babooram to be forged, but the signature of Dharani Dhar to be genuine. At the trial the judgment of the Munsif in the civil suit, although objected to on the part of the prisoner, was put in evidence by the prosecution, and read out to the jury, and the substance of the judgment was also referred to by the Sessions Judge in his charge to the jury.

The ground of the appeal is that this judgment was improperly admitted as evidence, and that eliminating the judgment, there is not sufficient evidence to justify the verdict. There can be no doubt that the judgment was improperly received. Technically it was inadmissible, because it was not between the same parties, the present parties technically being the Queen-Empress on the one hand, and the prisoner on the other, and the respective parties in the civil suit being the prisoner and the three defendants ; and furthermore it was not admissible on the substantial ground that the issues in the civil and criminal suit were not identical, and that the burden of proof rested in each case on different shoulders. It was not necessary for the Munsif in the civil suit to find more than that the execution of the bond by the three defendants was not proved. When the Munsif went further, and pronounced the bond a forgery, and directed a prosecution, it was not a decision on the question of forgery, but merely an opinion which, although he was entitled to give expression to it, ought no more to have been put in evidence on the present charge than the opinion of a Magistrate who commits a prisoner to take his trial upon a criminal charge.

The Judge in his summing up draws the attention of the jury to this judgment, and to Munsif's opinion contained in it, and uses the following words :—"The Munsif believed that one of the brothers, Dharani, executed the document, and that the other names were added afterwards by the prisoner with a dishonest intent. Whether this or whether all three names are forgeries, the offence is the same." It is true that the Judge later on says to the jury :—" You are not in any way bound by the finding of the Munsif ;" and that he also still later on draws their attention to the fact that in the civil suit the *onus probandi* was on the prisoner,

whereas at the trial for forgery the *onus* was on the prosecution. But inasmuch as neither the judgment nor the Munsif's opinion were evidence, the Judge, if he referred to them at all, ought to have told the jury not merely that they were not bound by them, but that it was their duty to dismiss them altogether from their minds. We have next to consider whether, independently of the objectionable evidence, there is sufficient evidence to justify the verdict of the jury; and in deciding this question we must bear in mind that we are not dealing with the decision of a Judge sitting either with or without assessors, but with the verdict of a jury,—a species of decision with which this Court will not interfere except upon very substantial grounds.

The evidence for the prosecution consists of the Munsif who directed the prosecution, and also of two pleaders who were concerned in the civil trial, and who appear to have been called for the purpose of proving a fact not disputed, namely, that the kist-bundi, with the signatures of the three defendants, was used by the prisoner as genuine in the course of that trial. The only other witnesses are Bansheeram and Dharani Dhar, two of the parties whose names appear on the bond as signatures. Their brother, Babooram, whose name also appears on the bond as a signatory, has not been called as a witness by the prosecution, although the jury has found that his signature is forged, as well as Bansheeram's.

Dharani's evidence may be dismissed from consideration with the observations that the jury did not believe him, although he stoutly denied before them, as he did also before the Munsif in the civil suit, that he ever executed the bond, the jury having found that he did. The evidence for the prosecution therefore rests upon the testimony of Bansheeram alone, supported, no doubt, by the suspicious appearance of his and his brother Babooram's signatures on the bond; but on the other hand, weakened materially by the facts that Dharani, one of his brothers, is found to have given an entirely false account as to how this name came to appear on the bond, and that Bansheeram himself admits that he and the prisoner had disputes about land, and are consequently on bad terms, and have been so during the last year.

On the other hand, there was produced before the jury a considerable body of evidence for the defence, consisting, first, of the stamp-vendor and two villagers, apparently neighbours, who speak

about an attempt made to settle, as to which the Judge observes in his charge that it is impossible that the attempt should have been made if Dharani and Bansheeram were speaking the truth; and secondly, of three of the attesting witnesses to the bond, who depose to having seen the bond executed by the three brothers.

Such being the state of the evidence, we think that, throwing out the inadmissible evidence, there was not evidence sufficient to justify the verdict.

We further think that, considering the extreme weakness of the case for the prosecution, it is improbable that the jury could have given that verdict, unless they had been influenced, in favor of the prosecution, by the Munsif's opinion as expressed in his judgment.

The jury evidently disbelieved the six witnesses called for the defence, and they probably did so, because it failed to account for the peculiar appearance presented by the signatures of Bansheeram and Babooram. This appearance is undoubtedly very suspicious. The two signatures are on a line, and seem to have been squeezed in between Dharani's signature and the official stamp. Supposing the two signatures to be genuine, it is extremely probable that Dharani signed first, and that the signatures of Banshee and Baboo were written afterwards above Dharani's signature. The attesting witnesses, however, unmistakably deposed that Bansheeram signed first, Babooram next, and Dharani last.

It is quite possible that the jury may, in addition to the weight which they gave to the Munsif's judgment and opinion, have acted upon the evidence of Bansheeram, because they disbelieved the defence. If they did so, it was in spite of the caution of the Judge, who very properly told them that no failure of the defence could count against the prisoner, unless they were of opinion that the cause for the prosecution was proved. If we had thought that, leaving out the Munsif's judgment, there was evidence, which, if believed, pointed, with reasonable certainty, to the guilt of the prisoner, we should, while setting aside the conviction, have directed a new trial. But we are of opinion that the evidence for the prosecution is not of that character; and must, therefore, set aside the conviction and sentence, and direct the discharge of the prisoner.

Field, J.—I also am of opinion that the judgment of the Munsif was not admissible in the case before the Court of Sessions.

It is true that the Sessions Judge told the jury that they were not bound by the finding of the Munsif, but in the commencement of his summing up he said that "the Munsif believed that one of the brothers, Dharani, executed the document, and the other names were added afterwards by the prisoner, or with his knowledge, and with a dishonest intent." This passage is not introduced in the course of argument, or with reference to other matters, but the opinion of the Munsif is placed directly and in an unqualified manner before the jury.

Further on, in the summing up, where the Sessions Judge told the jury that they were not bound by the finding of the Munsif, he again mentioned the fact that the Munsif had told them that the appearance of the bond convinced him that the signatures of the two elder brothers had been fraudulently added, although, as far as Dharani is concerned, he believes that the signature is genuine.

This, I observe, is introductory to an argument which ultimately turned in favor of the accused.

I think, however, that there can be reasonable doubt that the reception of the Munsif's judgment as evidence, and the reference made by the Sessions Judge to the Munsif's opinion in his summing up, produced a considerable impression on the minds of the jury. But for that impression, I think it highly probable that the jury would not have convicted on the rest of the evidence in the case; and think that in the discharge of the duty laid on this Court, it is impossible for us to say on the evidence, which remains after eliminating what was improperly received, that the accused should have been convicted.

I, therefore, concur in setting aside the verdict of the jury and the sentence passed in consequence.

ACKNOWLEDGMENT.

We beg to acknowledge with thanks the receipt of a copy of "The Law relating to the Hindu Widow by Trailokyanath Mitra, M. A., D. L., Tagore Law Professor," being the substance of the Tagore Law Lectures delivered in 1879. The book has been very neatly got up by Messrs. Thacker, Spink & Co. Our space, however, does not allow us to notice at length this work in the present number. We shall try to do it in our next.

S. 319.

279. The pain caused by a blow across the chest with an umbrella was held not to be of such a trivial character as to come within s. 95, Penal Code, but to come under the definition of hurt in s. 319.—24 W. R., Cr., 67.

S. 320.

280. Where both the cheeks of the complainant were branded with hot iron, it was held that if the scars on the complainant's face were of a character to cause any permanent disfigurement, the offence amounted to grievous hurt.—*Reg. v. Anta bin Dadoba, et. al.*, 1 Bom. H. C. R., 101.

S. 322.

281. Where a prisoner was charged under ss. 304, 325, and 323, Penal Code, and the jury brought in a verdict of guilty under s. 335,—Held, that he was not acquitted of grievous hurt, but found guilty of the offence described in s. 322 with the extenuating circumstances which would confine the punishment within the limits specified in s. 335.—23 W. R., Cr., 61.

S. 323.

282. Where a prisoner was charged under ss. 304, 325, and 323, Penal Code, and the jury brought in a verdict of guilty under s. 335,—Held, that he was not acquitted of grievous hurt, but found guilty of the offence described in s. 322 with the extenuating circumstances which would confine the punishment within the limits specified in s. 335.—23 W. R., Cr., 61.

283. Where, according to the prisoner's own confession (which was the only direct evidence against her), she, with a view of chastising a disobedient and impertinent child, but without any intention of killing her, in a fit of passion struck her and knocked her down senseless, and afterwards hung her up to the beam, so as to make it appear that the girl had committed suicide,—Held, that the conviction should be under s. 323, Penal Code, of voluntarily causing hurt.—18 W. R., Cr., 29.

S. 324.

284. The charge and finding in a case of causing hurt under s. 324 of the Indian Penal Code need not contain a negation that the hurt was caused on grave and sudden provocation.—4 Mad. H. C. R., 5.

285. It is not necessary that the manner of use of the weapon must be such as likely to cause death.—7 Mad. H. C. R., 11.

286. Rioting, armed with deadly weapons, and stabbing, are distinct offences, and punishable separately under ss. 148, 149, and 324.—7 W. R., Cr., 60. See also 5 W. R., Cr., 19. But see 10 W. R. Cr., 63.

S. 325.

287. Where, in the commission of a robbery, death was caused by a blow with a lattee on a tender part of the head, the conviction was altered from one under s. 394, Act XLV of 1860, to one under s. 325.—6 W. R., Cr., 16.

288. Where a prisoner was charged under ss. 304, 325, and 323, Penal Code, and the jury brought in a verdict of guilty under s. 335,—*Held*, that he was not acquitted of grievous hurt, but found guilty of the offence described in s. 322, with the extenuating circumstances which would confine the punishment within the limits specified in s. 335.—23 W. R., Cr., 61.

S. 326.

289. The offence of administering deleterious drugs, when life was not endangered, is punishable under s. 328, Penal Code, and not under s. 326.—4 W. R., Cr., 4.

S. 328.

290. Meaning of the words "or other thing" in s. 328, Penal Code.—1 W. R., Cr., 7.

291. The offence of administering deleterious drugs, when life was not endangered, is punishable under s. 328 Penal Code, and not under s. 326.—4 W. R., Cr., 4.

S. 330.

292. S. 330, Penal Code, does not apply to a case of hurt caused to a person to extort a confession from her that she was a witch.—13 W. R., Cr., 23,

293. S. 330, Penal Code, was intended to describe the offence of inducing a person by hurt to make a statement or confession having reference to an offence or misconduct whether committed or not.—20 W. R., Cr., 41.

S. 334.

294. Causing hurt on grave and sudden provocation to the person giving the provocation is chargeable as an offence under s. 334 of this Code.—*Reg. v. Bhala Chala*. 1 Bom. H. C. R., 17.

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THE
LEGAL COMPANION.
APRIL, 1881.



CALCUTTA HIGH COURT.

THE 29TH SEPTEMBER, 1880.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Maclean.

KASI CHUNDER MOZUMDAR (*Petitioner*). (1)

*Case settled without Evidence—Sanction to prosecution
for giving False Evidence.*

The law imposes the duty of sanctioning or refusing to sanction criminal proceedings against parties or their witnesses upon the Court which hears the evidence or upon the Court to which such Court is subordinate.

Where a case is settled without evidence being gone into, the Court in which the suit was brought, even if it have power to sanction criminal proceedings against any of the parties to such suit under s. 468, Act X of 1872, is guilty of great impropriety and indiscretion in so doing, inasmuch as it can have had no opportunity of judging of the *bond-fides* of the claim or defence.

Garth, C. J. (in delivering judgment said):—The Court which has the best means of forming an opinion upon the *bond-fides* of the parties and the truthfulness of the witnesses, is the Judge who hears the evidence, and therefore, upon that Court or upon some superior Court which has the power of looking into the proceedings, the law imposes the duty of sanctioning or refusing to sanction criminal proceedings against the parties or their witnesses.

But if a case is settled without any evidence being gone into, it seems to me that the Court in which the suit was brought has no opportunity of judging of the *bond-fides* of the claim or defence, and if it has any power at all under such circumstances, which I very much doubt, to give its sanction to criminal proceedings against either party, I think it would be guilty of a great impropriety and indiscretion in so doing.

(1) I. L. R., 6. Calc., 440.

CALCUTTA HIGH COURT.

THE 29TH NOVEMBER, 1880.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Field.

IN THE MATTER OF THE PETITION OF MOHAMED ESHAK.

CHUNDRO MARWARI v. MOHAMED ESHAK.(1)

Appeal—Jurisdiction—Time from which an Order of Appointment dates.

An Assistant Magistrate convicted an accused on the 12th August, and by an order of even date, such Magistrate was invested with power to act as a Magistrate of the first class, although the fact, that he had been so invested with full powers, was not communicated to him until the 23rd idem. The accused appealed to the District Magistrate, and was acquitted. On motion made to the High Court to set aside the acquittal, on the ground that, after the date of the order of the Lieutenant-Governor investing the Assistant Magistrate with further powers, no appeal lay to the District Magistrate,—held, that even supposing the Lieutenant-Governor's order conferred first-class powers upon the Assistant Magistrate from the moment it was made, it must be shown before the District Magistrate's decision could be set aside, that the order of the Lieutenant-Governor was signed before the conviction.

Quare.—Whether an order investing a Magistrate with first-class powers is of any force, or amounts to an authority to exercise such powers, until the order has been officially communicated to the Magistrate ?

The publication of the judgment does not seem necessary.

CALCUTTA HIGH COURT.

THE 9TH DECEMBER, 1880.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Field.

THE GOVERNMENT v. KARIMDAD.(2)

Penal Code (Act XLV of 1860), s. 211—Prosecution for making a false charge—Opportunity to Accused to prove the truth of Charge.

Before a person can be put upon his trial for making a false charge under s. 211 of the Penal Code, he must be allowed an opportunity of proving the truth of the complaint made by him; and such an opportunity should be afforded to him, if he desires to take advantage of it, *not before the Police, but before the Magistrate.*

Magistrates should clearly understand that whilst the Police perform their proper duty in collecting evidence, it is the function of the Magistrate alone to decide upon the sufficiency or credibility of such evidence when collected.

JUDGMENT :—We are unable to see that the orders passed by the Deputy Magistrate in this case are irregular or illegal. Whatever

(1) I. L. R., 6 Calc., 476.

(2) I. L. R., 6. Calc., 496.

opinion may have been formed by the Magistrate upon the Police report as to the truth of Karimdad's complaint, when he appeared with his witnesses and asked to be allowed to prove his case, we think that the Magistrate could not, without hearing him and his witnesses, and deciding upon the truth or falsehood of his charge, proceed to put him on his trial under s. 211 of the Penal Code. It is manifest justice that a man ought not to be tried for making a false complaint, until he has had an opportunity of proving the truth of the complaint made by him; and such opportunity should be afforded him, if he desire to take advantage of it, not before the Police, but before the Magistrate. If persons are to be prosecuted under s. 211 of the Penal Code, upon the mere report of a Police officer that their complaints are not true, the Police are made the judges whether a complaint is true or false. Such a delegation of magisterial functions is not contemplated by the law, and it requires but little experience of this country to understand how dangerous it would be to the best interests of justice. Magistrates of all grades cannot understand too clearly that, while the Police perform their proper duty in collecting evidence, it is the function of the Magistrate alone to decide upon the sufficiency or credibility of this evidence when collected.

We decline to interfere (1).

CALCUTTA HIGH COURT.

THE 3RD DECEMBER, 1880.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Field.

In re MIR EKRAR ALI.

THE EMPRESS v. MIR EKRAR ALI (2)

Penal Code (Act XLV of 1860), ss. 192, 464, cl. 2—Fabricating False Evidence—Forgery—Alteration of Date of Document.

Where the date of a document, which would otherwise not have been presented for registration within time, is altered for the purpose of getting it registered, the offence committed is not forgery, where there is nothing to show that it was done "dishonestly or fraudulently," within cl. 2, s. 464 of the Penal Code, but fabricating false evidence within s. 192.

(1) See *Empress v. Irad Ally*, I. L. R., 4 Calc., 869; *Empress v. Salik*, I. L. R., 1 All., 527; *Empress v. Abdul Husain*, I. L. R., 1 All., 497; *Bhokteram v. Heera Kholita*, I. L. R., 5 Calc., 184; and *Ashraf Ali v. The Empress*, I. L. R., 5 Calc., 181.

(2) I. L. R., 6 Cal. 482.

THE facts sufficiently appear in the judgment of the Court (GARTH, C. J., and FIELD, J.), which was delivered by

Garth, C. J.—The accused presented a bond for registration on the 18th December 1879. This bond is said to have been originally dated the 6th August 1879. If this date had remained, the instrument was presented after the time within which such an instrument must be by law presented for registration. The accused is said to have altered the date to the 26th August, in order to bring the bond within time; or to have presented it for registration, knowing that the date had been so altered. It appears to us that the alteration of the date under these circumstances is not forgery, as there is nothing to show that it was done “dishonestly or fraudulently,” within the meaning of cl. 2, s. 464 of the Penal Code.

It is not contended that the bond itself was not genuine, or that the accused intended to support a false claim by a false bond. It is clear that his intention in altering the date of the bond was to cause the registering officer to entertain an erroneous opinion, touching a point material to the result of the registration proceedings; and this being so, his acts constituted fabricating false evidence (ss. 192, 193, Penal Code), and using fabricated evidence (s. 196, Penal Code).

In this view of the law, and as the Sessions Judge did not take a serious view of the offence committed, we reduce the sentence of imprisonment to two months' rigorous imprisonment. The sentence of fine will stand.

Sentence modified.

CALCUTTA HIGH COURT.

THE 7TH DECEMBER, 1880.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Field.

IN THE MATTER OF THE PETITION OF THE LEGAL REMEMBRANCER.

THE EMPRESS v. NOBOGOPAL BOSE.(1)

Transfer of Criminal Case to another District—Criminal Procedure Code (Act X of 1872), s. 64—Grounds necessary to obtain Transfer when application is opposed by Accused.

Before the transfer of a case from a Criminal Court to another can be made, in cases in which the accused objects to the transfer, the prosecution must bring forward the very best evidence to prove that a fair trial cannot be had in the district in which the case is ordinarily triable.

(1) I. L. R., 6 Calc., 491.

Garth, C. J.—I think that this rule should be discharged.

It was granted at the instance of the Legal Remembrancer calling upon Nobogopal Bose and the other prisoners to show cause why the case against them, which now stands for trial in the Sessions Court of Burdwan, should not be transferred to Hooghly or to the 24-Parganas, or to some other jury district, upon the ground that a fair trial is not likely to be obtained at Burdwan.

The affidavit in support of this rule was made by Mr. Stevens, the District Magistrate of Burdwan, and it is certainly couched in very general terms.

Mr. Stevens says, that he has been credibly informed, and believes, that the case is causing considerable excitement in the district ; that the prosecutor, and the prisoner Nobogopal Bose, are persons of influence in the locality ; and that most of the inhabitants of the town of Burdwan and its neighbourhood have their sympathies enlisted on one side or the other. But he does not tell us from what sources his information is derived, nor, except in very general terms, the grounds of his belief.

But we were nevertheless induced to grant the rule, because having regard to the allegations in the affidavit, we thought it extremely probable that both sides might wish to have the case tried elsewhere, and that it would be at least as desirable for the prisoners as for the Crown that the trial should not take place at Burdwan.

It now appears, however, that all the prisoners, and especially Nobogopal Bose, object very strongly to the transfer, both upon the ground of expense and otherwise ; and it therefore becomes our duty to determine whether, under the circumstances disclosed in the affidavits on either side, we are justified in removing the case from the Court where it is legally triable.

I am clearly of opinion that before we transfer a criminal case to another district against the wish of the accused party, we ought to require the very best evidence that a fair trial cannot be had, or in other words, that the jury cannot be trusted to do their duty impartially.

Now, as I said before, Mr. Stevens's affidavit is very general in its language. It seems that he himself has only been in the district about three months. He does not tell us what are his sources of information or the grounds of his belief, and it may be, as Mr. Gasper has suggested, that he has acted upon the report of the

Police, who may be desirous of having the case tried in another district.

On the other hand, we have an affidavit from the prisoner Nobogopal Bose, in which he says, in the first place, that he has made arrangements for the trial at Burdwan, and incurred considerable expense in so doing; and in the next place he says, that there are upwards of 290 jurymen in the district of Burdwan, that with at least 180 of those persons he is not acquainted, and that to the best of his belief, he does not know any one who is acquainted with them; and lastly, he directly contradicts the statements of Mr. Stevens as to the case having caused any public excitement.

Then we must also bear in mind, in dealing with applications of this kind to transfer a case from one district to another, that there are many safeguards in this country against any undue bias on the part of the jury.

In the first place, there is the right to challenge any of the jurymen who are known to be partizans of either party, if there is any real ground for supposing that they are likely to be unduly biased. Then another safeguard, as Mr. Gasper very properly observes, is, that the Judge may, if he pleases, disregard the verdict of the jury altogether, and there is also the High Court as a last resource in case of any miscarriage of justice. So that there is less reason here than there might be in England for transferring a case for trial to another district, upon the ground that an impartial jury is not likely to be obtained.

If, therefore, the Crown considers it desirable that the trial should take place elsewhere, the application should have been made upon much more cogent grounds and better materials than those which we have now before us, and we cannot accede to the suggestion of the learned Government Pleader, that we should postpone our decision upon their rule, in order that some fresh materials may be obtained.

I should also add, that if I had more doubt about the matter than I have, I confess that what we have just now heard from my learned brother, and from the Government Pleader, would have influenced my mind very materially. We are informed by the latter (although he has had a large experience in this Court for many years) that he is unable at present to mention a single instance in which such a transfer in a criminal case has been made. And my

learned brother, who, we all know, has had a very large experience in the mofussil both as a District Judge and a Magistrate, does not remember any case of such a transfer, although in many instances criminal trials have been held under circumstances which have caused considerable public excitement.

The rule must, therefore, be discharged.

Field, J.—I concur in thinking that this rule should be discharged.

This is an application, under s. 64 of the Code of Criminal Procedure, to have a criminal trial before the Court of Sessions transferred from the Burdwan district to the district of Hooghly, Howrah, or the 24-Parganas.

The grounds upon which such a transfer can be made under s. 64 are—(1) that it will promote the ends of justice, or (2) that it will tend to the general convenience of the parties or their witnesses.

Now the second ground may be disposed of at once, for in the present case it is not attempted to be shown that the transfer of the trial from Burdwan will tend to the convenience of the parties or witnesses, while on the part of the accused, it is strongly urged that the transfer, if allowed, will cause considerable inconvenience and expense to him in procuring the attendance of the witnesses whom he wishes to call for the defence. Then as to the first ground it appears to me that, in order to obtain such a transfer, there should be shown to this Court something more tangible and something more definite than is disclosed in the affidavit made by Mr. Stevens. It may be that this gentleman entirely believed what he has stated in his affidavit, and I have no doubt that he did believe it. But what he has stated is stated not upon his own personal knowledge, but upon his belief and upon information received from third parties, who are not mentioned, and as to whose means of knowledge or good faith we have no means of forming an opinion.

I think that this affidavit, unsupported by other matter, even under the system of criminal law in force in England, would be considered insufficient; and I think that in this country it is *ex majore vi* insufficient, and for this reason;—the system of criminal law in force in India differs in three essential respects from that in force in England. In the first place, the jury must not necessarily be agreed in the verdict. The verdict of a majority is sufficient. In the second place, the accused must not necessarily be acquitted,

if the jury or the majority of them find him not guilty. The Sessions Judge can, if he differs in opinion from the jury, refer the case for the consideration of the High Court, and it has been decided that upon such a reference, the High Court can consider the case as well upon the facts as upon the law. In the third place, the Local Government, if dissatisfied with the verdict of acquittal, can appeal against it to the High Court.

Having regard to these essential points of difference between the law in India and the law in England, it appears to me that, in order to succeed in an application of this nature when opposed by the person committed for trial, at least as strong a case should be made out in this country as in England, and speaking for myself, I should say a stronger case.

It may be observed that in the affidavit upon which this rule was granted, it was stated that Giridhari Mohunt, upon whose prosecution the accused have been committed, has a strong party in Burdwan opposed to Nobogopal, accused, while Nobogopal has influence with persons opposed to Giridhari. It therefore appeared quite possible that Nobogopal would himself wish to be tried in another district; but as he desires to be tried at Burdwan, and is willing to risk the influence of Giridhari being exerted against him, an order for the transfer of the trial can be made only if we are satisfied that Nobogopal may, or may be able to, exert his influence with the jury, so as to defeat the ends of justice, and of this I am not satisfied on the affidavit, which is the only evidence before us. I concur in discharging the rule.

Rule discharged.

CALCUTTA HIGH COURT.

THE 29TH JANUARY, 1881.

Before Mr. Justice Prinsep.

THE EMPRESS *v.* DAEEE PERSHAD.(1)

Admission made to a Police Officer before Arrest—Evidence Act (I of 1872), ss. 25, 26.

An admission made by an accused person to a Police officer before arrest is admissible in evidence.

(1) I. L. R., 6 Calc., 530.

In the course of the trial in this case, the *Standing Counsel* (*Mr. Phillips*) asked a witness on behalf of the Crown, Police Inspector Kristo Chunder Bannerji, to state what the accused had stated to him on an occasion when the witness had already said that the accused was not under arrest.

Mr. Sale, for the accused, objected on the ground that the accused at the time was under arrest.

Prinsep, J.—The question may be put. I agree in the opinion expressed by Phear, J., in the *Queen v. Macdonald*,⁽¹⁾ that the Evidence Act draws a distinction between an admission and a confession of guilt. The other cases⁽²⁾ quoted are not altogether on the point.

CALCUTTA HIGH COURT.

THE 5TH JANUARY, 1881.

Before Mr. Justice Morris and Mr. Justice Prinsep.

THE EMPRESS v. THOMPSON.⁽³⁾

Act IV of 1877, s. 124—Institution of fresh proceedings after dismissal of complaint for default.

An order of dismissal under s. 124 of Act IV of 1877 does not operate as an acquittal. There is no legal impediment to the institution of fresh proceedings by the presentation of a fresh complaint.

The publication of the *judgment* does not seem necessary.

CALCUTTA HIGH COURT.

THE 31ST JANUARY, 1881.

Before Mr. Justice Prinsep.

THE EMPRESS v. DABEE PERSHAD.⁽⁴⁾

Act X of 1875, s. 76—Act I of 1872, s. 33—Evidence taken upon Commission.

The evidence of a witness taken upon commission is not admissible in a criminal trial held before the High Court, unless it can be shown that such evidence was so taken upon an order made by that Court under s. 76 of Act X of 1875, or unless it is admissible under s. 33 of the Evidence Act.

(1) 10 B. L. R., (App.) 2.

(2) 1 C. L. R., 21; I. L.R., 1 Calc., 207; I. L.R., 3 Bom., 12; 11 Bom. H.C. Rep., 242.

(3) I. L. R., 6 Calc., 523.

(4) I. L. R., 6 Calc., 532.

Prinsep, J.—The deposition is inadmissible. S. 76 of the High Court's Criminal Procedure Act contemplates that evidence, when taken upon commission, if intended to be used in the High Court, must be taken upon an order made by that court under that section. The terms of s. 158 of the Presidency Magistrates' Act, quoted by Mr. Phillips, refer only to the record of the trial or enquiry before the Magistrate. The evidence taken by a commission issued by order of a Magistrate could not here be admissible under s. 33 of the Evidence Act.

CALCUTTA HIGH COURT.

THE 9TH NOVEMBER, 1880.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Maclean.

CHANDRAKANTA DE(1) (*Petitioner*).

Penal Code (Act XLV of 1860), s. 188—Injunction in Civil Suit—Disobedience of Order.

Section 188 of the Penal Code applies to orders made by public functionaries for public purposes, and not to an order made in a civil suit between party and party.

The proper remedy for disobedience of an order of injunction passed by a Civil Court is committal for contempt.

Garth, C. J.—In our opinion, s. 188 applies to orders made by public functionaries for public purposes, and not to an order made in a civil suit between party and party; so we think the Magistrate was right in refusing to act under the section.

If the defendant in the suit has disobeyed the injunction, the Judge ought, on the application of the plaintiff, to have sent him to jail for disobeying the Court's order; that was the proper remedy.

HIGH COURT, N.-W. P.

THE 25TH JUNE, 1880.

Before Mr. Justice Pearson.

EMPERESS OF INDIA *v.* KALLU (1) and another.

Village-watchman—*Act XLV of 1860 (Penal Code), s. 221—Act XVI of 1873.*

(*N.-W. P. Village and Road Police Act*), s. 8, *Act X of 1872 (Criminal Procedure Code)*, s. 92.

A chaukidar, or village-watchman, is not legally bound as a public servant to apprehend a person accused of committing murder outside the village of which he is chaukidar, such person not being a proclaimed offender, and not having been found by him in the act of committing such murder, and consequently such chaukidar, if he refuses to apprehend such person on such charge at the instance of a private person, is not punishable under s. 221 of the Penal Code.

THIS was a case referred to the High Court for orders by Mr. S. M. Moens, Sessions Judge of Mirzapur, at the request of Mr. G. S. D. Dale, Magistrate of the Mirzapur District. The nature of the reference appears from the Sessions Judge's letter of reference, which was as follows: "I have the honor to forward herewith, by request of the Magistrate of the District, for orders of the High Court, a case decided by Mr. Macmillan, Superintendent of the Family Domains of the Raja of Benares. The defendants were charged with an offence under s. 221, Penal Code, in that they, being village-chaukidars, refused at the request of one Ashraf, a private person, to apprehend Bahadur on the charge of murder, whereby the said Bahadur escaped, and has since evaded apprehension. Mr. Macmillan discharged the defendants on the ground that they were not legally bound as public servants to apprehend Bahadur; and s. 8 of Act XVI of 1873 bears out Mr. Macmillan's view, as the murder was not committed within the defendant's villages or beats, nor was Bahadur a proclaimed offender, nor did he commit the homicide in their presence. But Mr. Dale, the Magistrate, contends that village-chaukidars are Police officers, within the meaning of s. 92 of Act X of 1872. I cannot agree with him. The Code recognizes chaukidars under a distinct name, *viz.*, that of village-watchmen, in s. 90; and the whole tenor of Chapters IX and X shows that chaukidars were not intended to be included under the term Police officer,—(see ss. 93, 97, 99, 100, 110, 119, 126, 127).

(1) I. L. R., 3. All., 60.

Further, chaukidars are distinctly discriminated from 'Police' in s. 47 of the Police Act V of 1861, where also, as in Act X of 1872, s. 90, they are called 'village-watchmen'. Under the above circumstances, I hold that Mr. Macmillan's view of the law was correct, and his order of discharge legal, and that the defendants could not properly be charged under s. 221 of the Penal Code".

The following order was made by the High Court :—

Pearson, J.—I concur with the Sessions Judge in considering Mr. Macmillan's view of the law to be correct.

HIGH COURT, N.-W. P.

THE 26TH JUNE, 1880.

Before Mr. Justice Pearson.

EMPEROR OF INDIA v. GOBARDHAN DAS (1) and another.

Prosecution for giving false evidence—Sanction—Act X of 1872 (Criminal Procedure Code), ss. 468, 471.

An instruction to the Magistrate of the District by the Court of Session, contained in the concluding sentence of its judgement in a case tried by it, to prosecute a person for giving false evidence before it in such case, does not amount to sanction to a prosecution of such person for such offence, within the meaning of s. 468 of Act X of 1872, that section supposing a complaint, or at least an application for sanction for a complaint.

Where a Court thinks that there is sufficient ground for inquiring into a charge mentioned in ss. 467, 468 or 469 of Act X of 1872, it should proceed under s. 471 of that Act.

Attention of the Court of Session in this case directed to *Queen v. Baijoo Lal* (2)

THIS was an application to the High Court for the revision, under s. 297 of Act X of 1872, of an order of Mr. H. G. Keene, Sessions Judge of Meerut, dated the 17th May, 1880, "sanctioning the prosecution of the petitioners for giving false evidence." It appeared that the petitioners had given evidence on the behalf of one Shimbhu Dial at his trial before the Sessions Judge for the forgery of a judicial record. The Sessions Judge convicted Shimbhu Dial of the offence charged against him, disbelieving the statements of the petitioners. The Sessions Judge concluded his decision in Shimbhu Dial's case, dated the 17th May, 1880, in these terms : "Let the Magistrate of the District be informed that the

(1) *Vide I. L. R., 3 All., 62.*

(2) *Vide I. L. R., 1 Calc., 450.*

Court sanctions the prosecution of Gobardhan Das and Dwarka Prasad (petitioners) for false evidence."

The grounds of the application for revision were (i) that there was no evidence to show that the statements made by the petitioners were false, and the mere circumstance that the Judge disbelieved their evidence was not sufficient to warrant the inference that they had given false evidence; (ii) that the Judge had failed to comply with the provisions of s. 471 of Act X of 1872, not having made any preliminary inquiry, or recorded any proceeding showing that in his opinion an inquiry should be made; that the Judge's order should have specified the particular false statements made by the petitioners; and that the Judge's reasons for disbelieving the evidence of the petitioners were highly conjectural, and "it was beyond the scope and object of the law that prosecutions for giving false evidence should be allowed upon such grounds.

Pandit Nand Lal and Shah Asad Ali, for the petitioners.

Pearson, J.—The instruction given to the Magistrate in the concluding sentence of the judgment of the Sessions Court can scarcely be referred to s. 468 of the Criminal Procedure Code, which supposes a complaint, or at least an application for sanction for a complaint. S. 471 of the Code was doubtless the section under which the Sessions Court should have proceeded: But the provisions of that section have been altogether disregarded. The attention of the Sessions Judge is directed to the remarks of the learned Judges of the Calcutta High Court in the case of the *Queen v. Baijoo Lal* (1). In disposing of Shimbhu Nath's appeal, I have observed that there were no sufficient grounds for discrediting the evidence given by the petitioners on his behalf. I must, therefore, cancel the instruction and sanction given by the Judge to the Magistrate for their prosecution on a charge of giving false evidence, and direct that any proceedings which may have been instituted in pursuance thereof be immediately stayed and abandoned.

PRIVY COUNCIL.

THE 13TH AND 14TH JULY, 1880.

Present :

*Sir J. W. Colvile, Sir B. Peacock, Sir M. E. Smith, and Sir R. P. Collier.***RAJRUP KOER (Plaintiff) v. ABUL HOSSEIN and others (Defendants).**

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

*Limitation Act (IX of 1871), ss. 24, 27; sched. ii, art. 31, part v—**Presumption of Title founded on long continued User—Easement**—Obstructing a Watercourse—Continuing Act of Wrong.*

More than twenty years, and possibly fifty or sixty, before suit, the plaintiff's ancestors and predecessors in estate had constructed and used a *pāin*, or artificial watercourse, on the defendant's land, making compensation to them. The *pāin*, by a channel at one part of its course, contributed to the water in a *tīl*, or reservoir, belonging to the defendants; and by a channel at another part, took the water which overflowed from the *tīl*, after the defendants had used as much of the water therein as they required. Less than twenty years before the suit, the defendants, without authority, obstructed the flow of water along the *pāin* in several places. The Courts below differed as to whether some of these obstructions had not been made more than two years before the suit, the rest having been made within that period.

Held, that the provisions of Act IX of 1871, a remedial Act, and neither prohibitory nor exhaustive, did not exclude, or interfere with, the acquirement of rights otherwise than under them. A title might be acquired under that Act by a person having no other right at all; but it did not exclude, or interfere with, other titles and modes of acquiring easements. And s. 27, by allowing a user of twenty years, if exercised until within two years of suit, under the conditions prescribed, to give, without more, a title, did not prevent proof of an easement founded on another title independently of the Act. Such a long enjoyment, as the plaintiff had proved, should be referred to a legal origin, and the long user of the *pāin* and of the superfluous water of the *tīl*, afforded evidence giving rise to a presumption that a grant, or an agreement, had been made creating an easement. Although, on the assumption that some of the obstructions in question had existed for more than two years before the suit, the plaintiff might not have shown a right under Act IX of 1871, s. 27, yet he did not require its aid.

Held also, that such obstructions being continuous acts, as to which the cause of action accrued *de die in diem*, Act IX of 1871, sched. ii, part v, cl. 31, fixing two years from the date of the obstruction as the period of limitation "for obstructing a watercourse," did not preclude a suit complaining of obstructions though made more than two years preceding the date of the commencement of the suit.

APPEAL, by special leave, from a decree of a Division Bench of the High Court of Bengal (23rd February 1877), reversing a decree of the Subordinate Judge of Gya (17th August 1875), and restoring a decree of the Sudder Munsif of Gya (26th August 1874).

In January 1874, this suit was brought by Maharaja Ramkissen Singh, Raja of Ticari, in the Gya district, against the respondents, who were the owners of a village, Mouza Mora, in the neighbourhood of a zemindary, named Mehal Sunaut Parwariya, belonging to the Raja. Mouza Mora was situate between the Raja's zemindary and the commencement of a *páin*, or artificial watercourse, which brought water from a stream called the Phalgu Naddee to the Raja's Mehal. This *páin*, named *Páin Desain*, had been made by the Raja's ancestors on lands belonging to Mouza Mora, and on its course over the lands of that village towards Mehal Sunaut Parwariya, it was connected with a *tál*, or reservoir, which also was within the boundary of Mouza Mora.

The plaintiff claimed a declaration of his sole right to *Páin Desain*, and to the use of the water in the *tál*. He also claimed an order for the closing of openings in the *páin* recently made by the defendants for the draining off of water on to their lands; and for restraining them from interfering with sluices which regulated the flow of water out of the *tál*.

The defendants maintained that the water in the *tál* belonged to them, and that the plaintiff had not the sole right to the use of *Páin Desain*; that the openings and obstructions complained of were of long standing, and that the suit for their removal was barred by limitation.

The Sudder Munsif of Gya held, that the right to the use of the *páin* belonged to the plaintiff, and that the defendants had the right to the water in the *tál*, excepting the overflow, to which the plaintiff was entitled. He ordered, that all the openings made by the defendants in the *páin*, twelve in number, should be closed, except two, numbered 3 and 10, as to which he held the suit, was barred by art. 31, sched. ii, Act IX of 1871, they having been in existence for more than two years before the suit was brought.

Both parties appealed to the Subordinate Judge of the district, who modified the decision of the Munsif in favor of the plaintiff holding that the two years' limitation did not apply to the claim. Whilst proceedings were pending in the High Court, to which both parties appealed, the Raja died, and the present appellant was substituted for him on the record. The judgment of the High Court (JACKSON and McDONELL, J.J.) was as follows:—

"The questions before the Court in this case are not unlike those which came before this Bench, at least before myself and my colleague Mr. Justice Glover, in 1870, in a case which is reported in 14 Weekly Reporter, page 349,(1), with this exception, that the position of parties is reversed. The plaintiff here is the owner of a *páin*, which traverses the land of the defendants. It appears to me, that it is scarcely an adequate description of the plaintiff's right in this case to say, that he has a bare easement or right to pass water over the defendants' land for the purpose of irrigating his own. The evidence shows, and the Courts appear to have found, that the *páin* was constructed by the ancestors of the plaintiff a great many years ago, possibly fifty or sixty years, certainly more than twenty years, for the purpose of irrigation: and there is part of the evidence which indicates that such construction was accompanied with certain advantages on the part of the defendants, which compensated them for any injury or inconvenience caused by the construction of the *páin*. In that state of things, it seems that the defendants have, at various times within the last few years, made a number of openings in that *páin*, for the purpose of drawing water, to the injury of the whole village. In this state of the facts, what we stated in the case above cited would apply, and we think that if the defendants were to be at liberty, without the plaintiff's consent, to construct a number of openings, and thereby seriously diminish the supply of water carried through the *páin* to the plaintiff's mouza, that would cause serious disturbance, and the plaintiff would be most wrongfully injured thereby. But to this state of the rights of the parties we have to apply the provisions of the Limitation Act; and we find that the plaintiff, in order that he may obtain relief in respect of an infringement of his easement, must come into Court within two years from the time that such infringement took place. The Munsif found, and it appears to us on very good grounds, that, as regards two of the openings from which the plaintiff complained that he sustained injury, they were in existence much more than two years before the commencement of the suit. Of course, the Subordinate Judge might, if the evidence permitted it, come to a different conclusion upon that part of the case, and the respondents' vakeel suggests that he did intend to do so by the use of these words—'With reference to the

(1) *Maharajee Indarjeet Koer v. Lachmi Koer*, 14 W. R., 349.

dhonga and *khúnd*, the Munsif has referred to the papers filed by the plaintiff, but those papers do not refer to the *dhonga* and *khúnd* in particular ; but we do not think that, in these words, the Subordinate Judge meant to reverse the finding of the Munsif on a question of fact, for, after the remark which he there makes, he goes on to dispose of part of the case on different grounds by, as is admitted before us to-day, a misapplication of the law of limitation. If we thought that there was any ground for coming to a different conclusion upon this fact, we should have been inclined to remit the case back ; but we are satisfied that the Munsif's finding on this point is unassailable. Concurring, therefore, in the general view taken by the Court below of the rights of the parties, and being of opinion that the decision of the Munsif is correct as regards the *khúnd* and the *dhonga* mentioned by him, and being also of opinion that the cross-appeal filed by the plaintiff in regard to the use of the *tál* has no force, we think that the judgment of the Lower Appellate Court, so much as varies the judgment of the Munsif, must be set aside, and that the Munsif's decision must be restored."

From this decision the plaintiff appealed.

Mr. Woodroffe, for the appellant.

Mr. C. W. Arathoon, for the respondents.

For the appellant it was contended that the law relating to title by prescription had not been correctly applied, and that there had been misdecision on the merits. Title was to be presumed after long and undisturbed enjoyment, such as the plaintiff had shown in the continuous user of the *páin* for fifty or sixty years. The *páin*, also, had been originally constructed by the plaintiff's ancestors, from whom he had inherited the right to it, and compensating advantages had been conferred on the defendants' village. Documentary evidence, extending back to 1830, had been referred to. After all the above, the plaintiff should have been found entitled to the *páin*, independently of the rules relating to prescription in Act IX of 1871. It was also argued that, as insufficient weight had been given to necessary presumptions, and as the finding of the Subordinate Judge in regard to obstructions 3 and 10 had been misread by the High Court, a general modification of the decree was required. On the questions of law, to which it was intimated that Mr. Woodroffe's argument must be limited, it was contended that

neither the plaintiff's title, nor his consequent right to the removal of all the obstructions, failed, even supposing that all the conditions in s. 27 of Act IX of 1871, in order to prove an easement, had not been satisfied. That Act, as its preamble stated, provided "rules for acquiring ownership by possession;" but it repealed no law under which title existed independently of it. On ancient user being established, as it had been in this case, the presumption arose that such user was of right, and was lawfully founded on title. On this point were cited *Gooroopershad Roy v. Bykunto Chunder Roy*,⁽¹⁾ and *Mahomed Ali v. Jugulram Chandra* ⁽²⁾. But even if the plaintiff's title, and his claim to the removal of the obstructions, rested on the Act, it still was unnecessary to consider whether or not any of the obstructions had been in existence for more than two years before the commencement of this suit, when certainly none of them had been in existence for twenty years. Obstructions did not amount to legal "interruption" of the exercise of a right, unless submitted to, or acquiesced in, for a year by the owner after notice to him, according to the "explanation" given in s. 27 of Act IX of 1871. On this point *Alimooddeen v. Wuzer Ali* ⁽³⁾ was referred to; and on the corresponding provisions of the English Statute, 2 and 3 Will. IV, c. 71, *Flight v. Thomas* ⁽⁴⁾ was cited. It had not been shown that the violation of the plaintiff's right had been accompanied by the submission which s. 27 contemplated, so that the plaintiff's right of suit was complete under the Act if he resorted to it. Lastly, cl. 31 of part v of the sched. ii to Act IX of 1871 had no application to this claim. That section must be read as governed by the provisions of s. 24 of the Act relating to continuous acts, such as were the acts of obstructing the flow of water from the *tál*, and along the *páin*. The analogous rule of English law was laid down in *Gillon v. Boddington* ⁽⁵⁾ and *Whitehouse v. Fellowes* ⁽⁶⁾, showing that in such a case there was a cause of action arising every day that the obstruction was continued. As regards damages, cl. 31 might

(1) 6 W. R., 82.

(2) 5 E. L. R., App., 84; S. C. 14 W. R., 124.

(3) 23 W. R., 52.

(4) 10 Ad. & E. 590; S. C. on appeal, 8 Cl. and F., 231.

(5) 1 Ryan & Moody, 161.

(6) 30 L. J. C. P., 305.

operate to limit the amount recoverable, but the cause of action in this suit would accrue day by day during the maintenance of the obstructions, until twenty years should have expired; upon the expiration of which period, other rights would have arisen in favor of the opposite party.

Mr. C. W. Arathoon, for the respondents, having reviewed the position of the parties in regard to previous litigation and disputes about the subject of this claim, and having pointed out that some of the obstructions were of long standing, argued, that rights on either side, long contested, had resulted in the partial use of the *pāin* by the defendants for their own purposes. The rights of the respondents in the *tāl* required the protection that had been given to them in the decree. The survey maps having been referred to in connection with the above, the object of averting inundation was also shown to enter into the question of the rights of the parties. It was, however, contended that the facts had been found in the Indian Courts without any such difference of decision as rendered them still open to question. On the application of Act IX of 1871, it was argued, that the judgments of the High Court and the Sudder Munsif were correct, and *Juggessur Singh v. Nundlall Singh* (1) was cited.

Mr. Woodroffe in reply.

Their Lordships' judgment was delivered by

Sir M. E. Smith.—This was a suit brought by Maharaja Ramkissen Singh Bahadur to establish an asserted right to a *pāin* or artificial watercourse, and also to a *tāl*, or reservoir, and the water flowing from them through another estate to his own, and to obtain the removal of certain obstructions in the *pāin*. The Maharanee, the present appellant, is his widow. Several questions arising in the suit have been finally disposed of in the Courts below, leaving for the decision of their Lordships the main question, which arose on the special appeal before the High Court, as to the effect of the Statute of Limitations upon two of the obstructions complained of.

The facts necessary to raise this question may be shortly stated: The Maharaja and his ancestors were the owners of Mehal Sunaut Parwariya, in the district of Gya; and the defendants were the owners of an estate called Mouza Mora. The system of

irrigation claimed by the plaintiff embraces an artificial *páin*, which is fed by a natural river at a point to the south of the defendants' mouza. The *páin*, which runs from the south in a northerly direction, after traversing other estates, enters Mouza Mora, and runs through it, and afterwards through other lands to the defendants' mehal. There is, branching from the main *páin*, a channel or smaller *páin*, which helps to feed the *tál* claimed by the plaintiff. The *tál* lies near the foot of some hills, and is fed partly by the water which runs through the channel connected with the *páin*, and partly by the rainfall from these hills. It appears that there is another channel in a lower part of the *tál*, which runs from it and joins the *páin* at a point near a bridge, described in the Munsif's map. It is said there were doors or sluices in the bridge by which the flow of the water had been, to some extent, regulated, but no question now arises with regard to them. The obstructions complained of were twelve in number, consisting of dams, cuts, and other modes of obstructing or diverting the water from the *páin*.

The general result of the litigation below is, that the plaintiff succeeded in establishing his right to the *páin* as an artificial water-course, and to the use of the water flowing through it, except that which flowed through the branch channel, but failed to establish his right to the water in the *tál*, except to the overflow after the defendants, as the owners of Mouza Mora had used the water for the purpose of irrigating their own land. That, generally stated, is the result of the finding as to the rights of the plaintiff.

It was found in the Courts below that all the obstructions were unauthorised; and the plaintiff has succeeded below as to all the obstructions, except two, which are numbered No. 3 and No. 10. No. 3 is a *khúnd*, or channel cut in the side of the *páin* at a point below the bridge which has been spoken of. No. 10 is a *dhonga*, also below the bridge, and consists of hollow palm trees so placed as to draw off the water in the *páin* for the purpose of irrigating the defendants' land. No question arises here as to the fact that those two works are an interruption of the plaintiff's right; and he would be entitled to succeed as to them, as he has succeeded as to the other obstructions, unless he is prevented from so doing by the operation of the Statute of Limitations.

The Munsif has found that the Statute opposes a bar to his claim. The Subordinate Judge was of a different opinion, and reversed the Munsif's decree. On special appeal to the High Court, the Judges of that Court concurred with the Munsif, and reversing the decree of the Subordinate Judge, affirmed the Munsif's judgment.

Before adverting to the Statute, it is necessary to see upon what facts the Courts based their decisions. It appears that the Munsif found that these obstructions had been made more than two, but less than twenty years before the institution of the suit. The Subordinate Judge found, that the two obstructions were recently made; and it may be inferred from his disagreeing with the inferences which the Munsif drew from certain accounts which were produced, and the comments he made upon the latter's judgment in dealing with those accounts, that he meant to overrule the finding of the Munsif that the obstructions had existed for two years. If they had not existed for that period, no question on the Statute can arise. The High Court, without going into the facts, construed the judgment of the Subordinate Judge as not overruling the Munsif on the question of fact, and therefore they assume that these obstructions had existed for more than two years before the institution of the suit.

Their Lordships are disposed to dissent from the view of the High Court, and to come to the conclusion that the Subordinate Judge really did intend to overrule the finding of the Munsif upon the fact of the length of time during which these obstructions had existed; but, assuming the fact to be as the Munsif and the High Court have regarded it,—namely, that these obstructions had existed for more than two, but for less than twenty years, they think that no provision of the Statute of Limitations interferes with the plaintiff's right to recover in respect of them.

The Limitation Act, No. IX of 1871, contains two sets of provisions, which are in their nature distinct: one relates to the limitation of suits, and prescribes the limitation of time for bringing suits after the right to sue has arisen: the other set relates to the manner of acquiring title and rights by possession and enjoyment. The latter provisions are contained in Part IV of the Act, and are introduced under the heading "Acquisition of ownership by possession." They enact a mode of acquiring ownership by possession or

enjoyment. Section 27 is as follows :—“ Where any way or water-course, or the use of any water or any other easement (whether affirmative or negative), has been peaceably and openly enjoyed by any person claiming title thereto, as an easement and as of right, without interruption, and for twenty years, the right to such access and use of light or air, way, watercourse, use of water, or other easement, shall be absolute and indefeasible.” Then there is this provision, on which the judgment of the Munsif certainly proceeded, though whether the High Court proceeded on that or on the part of the Act which relates to limitation, properly so called, may be open to doubt. The clause is this: “ Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit, wherein the claim to which such period relates is contested.”

On the assumption of fact made by the Munsif that these obstructions had existed for more than two years before the suit, he might be right in finding that the plaintiff had not had peaceable enjoyment for twenty years ending within two years before the institution of the suit; and, therefore, that the plaintiff had acquired no title by virtue of this Statute. The object of the Statute was to make more easy the establishment of rights of this description, by allowing an enjoyment of twenty years, if exercised under the conditions prescribed by the Act, to give, without more, a title to easements. But the Statute is remedial, and is neither prohibitory nor exhaustive. A man may acquire a title under it who has no other right at all, but it does not exclude or interfere with other titles and modes of acquiring easements. Their Lordships think that, in this case, there is abundant evidence upon the facts found by the Courts for presuming the existence of a grant at some distant period of time. The result of the facts which appear in evidence, and the effect of the judgments of the Munsif and of the Subordinate Judge, are thus stated in the judgment of the High Court: “The evidence shows, and the Courts appear to have found, that the *pāin* was constructed by the ancestors of the plaintiff a great many years ago, possibly fifty or sixty years—certainly more than twenty years—for the purpose of irrigation; and there is part of the evidence which indicates that such construction was accompanied with certain advantages on the part of the defendants, which compensated them for any injury or inconvenience caused

by the construction of the *pāin*." This being an artificial *pāin* constructed on the land of another man at the distant period found by the Courts, and enjoyed ever since, or at least down to the time of the obstruction complained of, by the plaintiff and his ancestors, any Court which had to deal with the subject might, and indeed ought to, refer such a long enjoyment to a legal origin, and, under the circumstances which have been indicated, to presume a grant or an agreement between those who were owners of the plaintiff's mehal and the defendants' land by which the right was created. That being so, the plaintiff does not require the aid of the Statute; and his right, therefore, is not in any degree interfered with by the provision in the 27th section, upon which the Munsif decided.

This being their Lordships' view of the case, it becomes unnecessary to consider the argument addressed to them by Mr. Woodroffe upon the effect of the clause in the same 27th section under the head 'explanation,' which defines what is to be considered an interruption. Nor it is necessary to consider the doctrine laid down in *Thomas v. Flight*(1) in the Court of Exchequer Chamber, and afterwards in the House of Lords, with reference to a similar clause in the English Prescription Act.

Their Lordships have already observed that it appears to be open to doubt whether the High Court did not base its judgment on the part of the Statute which relates to limitation properly so called,—namely, on art. 31 of Part V of the second schedule, which limits the time for bringing suits for the obstruction of watercourses to two years "from the date of the obstruction." The judgment contains this passage: "We find that the plaintiff, in order that he may obtain relief in respect of an infringement of his easement, must come into Court within two years from the time when such infringement took place." If the Judges really meant to apply the limitation of art. 31 above referred to, their decision is clearly wrong: for the obstructions which interfered with the flow of water to the plaintiff's mehal were in the nature of continuing nuisances, as to which the cause of action was renewed *de die in diem*, so long as the obstructions causing such interference were allowed to continue. Indeed, s. 24 of the Statute contains express provision to that effect. For these reasons, their Lordships

(1) 10 Ad. & E., 590; S. C. on appeal, 3 Cl. and F., 231.

are of opinion that the judgment of the High Court with regard to the two obstructions in question cannot be sustained, and that the judgment of the Subordinate Judge as regards these obstructions ought to be restored.

There remains to be noticed the contention raised as to the *tál*. Mr. Woodroffe has strongly argued that the findings as to the *tál* in favor of the defendants are wrong; and he further endeavoured to show, by reference to the judgments, that they were not conclusive on that part of the case. Their Lordships, however, find, that there are distinct judgments of the Munsif and of the Subordinate Judge to the effect, that the defendants had a proprietary right in the *tál* and to the use of the water in the *tál*, and that the plaintiff had no right to the *tál* or to the water in it, except to so much as flows out of it in a natural course to the plaintiff's *páin*. To that overflow they considered him to be entitled, but to no more. Their Lordships, therefore, have come to the conclusion that, this case being heard only on special appeal, it is not open to the appellant to impeach those findings; and that, therefore, so far as this part of the case is concerned, they must dismiss the appeal. The result is, that their Lordships will humbly recommend Her Majesty, that both the decrees of the High Court be reversed; that the decree of the Subordinate Judge be affirmed; and that the decree of the Munsif be modified in accordance therewith.

Mr. Woodroffe desired that the language of the Munsif's decree with regard to the enjoyment of the water in the *tál* should be modified. Their Lordships, having considered what was addressed to them on that subject, and the language of the Munsif's decree, are not disposed to interfere with it. The plaintiff having claimed the whole of water in the *tál*, they think that the Munsif had to determine upon that claim; and that, having given only a qualified enjoyment of the water to the plaintiff, it was necessary, in order to arrive at what that qualified right was, to define the prior right of the defendants. He has done this in language which their Lordships, perhaps, would not have used themselves, but which is sufficiently intelligible. The Munsif having gone to the spot, and having taken apparently great pains with his decision, their Lordships are not disposed to alter or interfere with this part of his decree. Substantially it amounts to a declaration that the defendants are entitled to use the water of the *tál* for the irrigation of their estate.

If this should be wastefully or improperly done with reference to the right declared to belong to them, it may be the subject of a future inquiry. Their Lordships will, therefore, humbly advise Her Majesty to the effect above stated.

Their Lordships have considered the question of costs. The plaintiff having failed as to part of his appeal, they will follow the course which the High Court took, and give no costs to either party.

Appeal allowed.

Messrs. *Henderson & Co.*—Solicitors for the appellant.

Mr. *T. L. Wilson*.—Solicitor for the respondents.

JUDICIAL COMMISSIONER'S COURT, MYSORE.

THE 10TH MARCH, 1881.

Before J. D. Sandford, Esq., M. A., B. C. S., Judicial Commissioner.

CLEMENT WALKER (1) *Petitioner,*

versus

ABDUL RAJAK, *Counter-Petitioner.*

Interpretation of Penal laws, Principle of—Coffee Stealing Prevention Act, ss. 4, 5, and 9—Criminal Procedure Code, s. 418.

It is a principle in the interpretation of any penal law, more especially one that stretches the bounds of the ordinary criminal law, that its provisions shall be strictly construed, that is to say, that they shall not be interpreted so as to include other acts than are plainly within both its scope and its terms.

Judgment.—The accused has been convicted in this case of a breach of the provisions of s. 5 of the Coffee Stealing Prevention Act, which conviction has been upheld in appeal by the District Magistrate of Hassan, and application has now been made to this Court for revision of the District Magistrate's proceedings upon the ground that the sentence passed is wholly inadequate, that the District Magistrate's order, directing the restoration of the coffee to the accused, was bad in law and in principle, and is altogether unjust, and that the fine imposed upon the accused ought to have been awarded to the complainant.

(1) Criminal Petition No. 5 of 1881, against the order of the District Magistrate of Hassan, in Criminal Appeal No. 1 of 1881.

The second ground was that which was principally discussed in the course of the argument, and I will therefore consider it first, and I may at once say that I see nothing bad in law or unjust in the order. No provision is made in the Coffee Stealing Act for dealing with coffee, in regard to which any breach of the provisions of the Act has been committed. And if it be held that s. 418, Criminal Procedure Code, which empowers a Criminal Court to make orders for the disposal of property regarding which any offence appears to have been committed, applies to such cases, that section only gives the Magistrate a discretion to make such order as appears right, and I could not interfere with an order passed under it, unless the order on the face of the record appeared to be bad in law or manifestly unjust. But in this case, if regard be had to the act found against the accused, there is nothing bad in law or unjust in the order. The accused has been convicted under s. 5 of the Coffee Stealing Prevention Act, because he has not kept accounts of certain coffee found in his possession, and there can be no reason either on grounds of law or of principle, or of justice, why coffee in regard to which the only offence proved is that accounts have not been kept as directed by this special law, should be taken away from the possessor and given to the complainant or to any one else. There are some expressions indeed in the judgment of the Magistrate who tried the case originally, which point to the conclusion that the accused had obtained the coffee dishonestly; but there is no distinct finding to that effect, even in his judgment, while the District Magistrate, whose order I am asked to revise, is of opinion that positive dishonesty need not be imputed to the accused, and that he might have purchased the coffee by legal means. It is therefore out of the question that I should make any such order as that suggested by the applicant in regard to the coffee found in the possession of the accused.

But, further, I am of opinion that the conviction is in itself illegal. The section under which the accused has been convicted runs thus: "It shall be lawful for any one to purchase, take in barter, or exchange, or receive coffee from any person other than a laborer employed on a coffee estate, unless the person so purchasing, taking in barter or exchange, or receiving such coffee, shall immediately therefore enter or cause to be entered, in a book to be kept by him for that purpose, a true record of such transaction

specifying, &c., &c." Before then any one can be convicted of a breach of the provisions of this section, it must be proved that—(1) the accused had purchased, taken in barter or exchange, or received the coffee which is the subject of the accusation, from some person other than a laborer employed on a coffee estate; (2) that he has not entered in a book a true record of such transaction with the necessary particulars. In this case, the accused admits that he has kept no record of the transaction imputed to him, but he denies the transaction itself, and it was therefore the duty of the prosecution to prove the transaction. But no more has been proved than this, viz., that a larger amount of green coffee was found in the drying ground of the accused than could, according to the estimate of the witnesses, have been produced in his own coffee garden. He himself alleges that all this coffee was the produce of his own garden. But the Courts have found against him that the amount was larger than upon a fair estimate could have grown in his own garden. They have thereupon arrived at the conclusion that he must have obtained the coffee in one of the ways specified in s. 5. But this by no means necessarily follows. The accused may have picked the coffee himself elsewhere, he may have received it from a laborer employed in another estate, in which case he would have committed an offence, indeed, against s. 4, but not against the section under which he has been convicted. It is not incumbent upon the accused to say where he got the coffee, but upon the prosecution to prove distinctly that he has obtained it in one of the modes specified in the particular section, for a breach against which he has been convicted. The Magistrates have, in fact, applied to the accused, who is the proprietor of a coffee garden, the provisions of s. 9 of the Act which impose a penalty upon any laborer employed on an estate found with green gathered coffee in his possession for which he cannot satisfactorily account. It is obvious to remark that had the framers of this Act intended to apply such severe provisions of the law, the proprietors of coffee gardens in whose interest the Act was passed, they would specifically have included this class in the section. It is a principle in the interpretation of any penal law, more especially one that stretches the bounds of the ordinary criminal law, that its provisions shall be strictly construed, that is to say, that they shall not be interpreted, so as to include other Acts than are plainly within both its scope and its terms. The act

established against the accused, *viz.*, that he being the proprietor of a coffee garden has been found in possession of a larger amount of green coffee than can be grown in that garden is certainly not in itself within the terms of any one section of the Act. Possibly it may be thought that the accused, in obtaining the coffee, has offended against one or other of the sections of the Act. But in order to justify this conviction, it must be proved that he has committed the breach of the particular section under which he has been convicted, and this, as I have pointed out above, the prosecution has failed to prove, for it is not proved that the accused has in regard to this coffee entered upon any transaction of the nature specified in s. 5.

As my attention therefore has been specially directed to the conviction, and as it appears to me an illegal conviction, I am bound not only to reject the application made to me with regard to the disposal of the coffee and the fine, but also to set aside the conviction itself, and to direct that the fine paid by the accused be refunded to him.

Order will issue accordingly.

HIGH COURT, N.-W. P.

THE 1ST JUNE, 1880.

Before Mr. Justice Pearson and Mr. Justice Straight.

KHATUN BIBI(1) (*Plaintiff*) v. ABDULLAH (*Defendant*). (2)

Principal and Surety—Discharge of Surety by variance in terms of Contract—Act IX of 1872 (Contract Act), s. 133.

A *kabuliyat*, whereby a lessee agrees, without the consent of the person guaranteeing the payment of the rent agreed to be paid under a former *kabuliyat*, that he will pay rent at a higher rate than that agreed to be paid in such former *kabuliyat*, amounts to a variance of the terms of the contract of guarantee, and discharges the lessee's surety in respect of arrears of rent accruing subsequent to such variance.

ON the 9th March, 1872, one Abdul Qayum, to whom a lease of certain zemindari estates for a term of seven and a half years had been granted by the proprietors of such estates, in consideration of an annual payment of Rs. 390, executed a *kabuliyat* or counterpart of the lease in favor of the lessors. In this instrument he

(1) I. L. R., 3 All., 9.

(2) Second Appeal, No. 1321 of 1879, from a decree of Moulvie Mahmud Bakhsh, Additional Subordinate Judge of Ghazipur, dated the 8th September, 1879, reversing a decree of Munshi Kulwant Prasad, Mansif of Rasra, dated the 13th May, 1879.

convenanted, *inter alia*, to pay the lessors Rs. 390 annually in four equal instalments. On the same date, that is to say, on the 9th March, 1872, one Tafazzul, as the lessee's surety, executed a bond in favor of the lessors in which he hypothecated his two-anna eight-pie share in a village called Chahubandh as collateral security for the due payment of the lessee's rent. On the 29th May, 1872, without the consent of his surety, the lessee gave the lessors a second *kabuliyat*. This instrument, after referring to the exclusion of the lease and the *kabuliyat* of the 9th March, 1872, declared as follows: "But owing to the absence of the collection-papers relating to the aforesaid villages, a small amount was fixed as the profits of the lessors, and only Rs. 390 were entered in the *kabuliyat* as the profits of the lessors. According to the *tahsil* papers of the above villages, however, Rs. 450 should be fixed and paid as the profits of the lessees after deducting the revenue, the village expenses, patwaris' fees, and the lessee's collection-fees: of this amount Rs. 390 have already been entered in the *kabuliyat*: for the purpose of paying the balance of such profits, Rs. 60, I declare, by maintaining all the conditions of the *kabuliyat* referred to, and hereby agree, that the Rs. 60 in question shall be paid in four instalments." The instrument then provided that these instalments should be paid together with the four instalments payable under the *kabuliyat* of the 9th March, 1872. On the 20th December, 1874, Tafazzul executed a deed of sale of his two-anna eight-pie share in the village of Chahubandh in favor of his wife Khatun Bibi, the plaintiff in the present suit, in consideration of a dower-debt. On the 14th May, 1877, the lessors obtained an *ex parte* decree against the lessee and his surety Tafazzul for arrears of rent which became due in 1873, which decree gave the lessors a lien on the surcty's share in Chahubandh for its amount. This decree was subsequently purchased by the defendant in the present suit, Abdullah, who caused Tafazzul's two-anna eight-pie share in the village of Chahubandh to be attached and proclaimed for sale in the execution of it. Thereupon the present suit was instituted by the plaintiff, Khatun Bibi, in which she claimed in virtue of the deed of sale dated the 20th December, 1874, and her possession thereunder, a declaration of her proprietary right to the property, "by releasing it from attachment and protecting it from auction-sale," and the cancellation of the decree dated the 14th May, 1877. The contentions of the parties to the suit gave rise to

the question whether or not, regard being had to s. 133 of the Contract Act of 1872, the terms of the contract between the lessors and the lessee contained in the *kabuliyat* of the 9th March, 1872, had been varied by the terms of the subsequent *kabuliyat* of the 29th May, 1872, and thereby the surety was discharged, and the decree of the 14th May, 1877, was invalid as against the plaintiff, who was no party thereto. Upon this question the Court of first instance held that the terms of the contract contained in the first *kabuliyat* had been varied by those of the contract contained in the second *kabuliyat*, and Tafazzul was thereby discharged from his suretyship, and the plaintiff, being no party to the suit in which the decree of the 14th May, 1877, was made, was not affected by that decree; and in the event gave the plaintiff a decree. On appeal by the defendant the lower appellate Court held, on the question above stated, that Tafazzul was not discharged from his suretyship, and the plaintiff was bound by the decree made against him.

The plaintiff appealed to the High Court.

Munshi Hanuman Prasad and Babu Lal Chand, for the appellant.

Pandit Bishambhar Nath and Shah Asad Ali, for the respondent.

The judgment of the High Court (PEARSON, J., and STRAIGHT, J.,) was delivered by

Straight, J.—We think that the first plea in appeal should prevail, and that the judgment of the first Court should be restored. The *kabuliyat* of the 29th May, 1872, is practically an addition to that of the 9th March, and under it the amount of profits to be paid by the lessee is increased by Rs. 60 a year. It might well be that the surety would be willing to guarantee payment of Rs. 390, but unwilling to stand security for a larger sum, and it is admitted that his consent was neither asked nor given to the second agreement. The failure of the lessee to pay his rent was subsequent to the 29th May, and his defaults, in respect of which the suretyship was enforced, were all made after that date. S. 133 of the Contract Act therefore applies, and there having been a variance in the terms of the contract between the lessor and the lessee without the surety's consent, he was discharged. We think that the plaintiff appellant is not debarred from taking advantage of this objection to bring a suit for the relief she now seeks. The appeal will therefore be decreed with costs.

Appeal allowed.

PRINCIPLES OF THE PENAL CODE.

[As laid down by the original framers before the Governor-General of India in Council in the year 1837.]

ON OFFENCES AGAINST THE BODY.

(Continued from page 62 of the last volume.)

We propose that all voluntary culpable homicide shall be designated as murder unless it fall under one of three heads. We are desirous to call the particular attention of his Lordship in Council to the law respecting the three mitigated forms of voluntary culpable homicide ; and first to the law of manslaughter.

We agree with the great mass of mankind, and with the majority of jurists, ancient and modern, in thinking that homicide committed in the sudden heat of passion, on great provocation, ought to be punished, but that in general it ought not to be punished so severely as murder. It ought to be punished in order to teach men to entertain a peculiar respect for human life : it ought to be punished in order to give men a motive for accustoming themselves to govern their passion ; and in some few cases for which we have made provision, we conceive that it ought to be punished with the utmost rigour.

In general, however, we would not visit homicide committed in violent passion which had been suddenly provoked with the highest penalties of the law. We think that to treat a person guilty of such homicide, as we should treat a murderer, would be a highly inexpedient course—a course which would shock the universal feeling of mankind, and w^ould engage the public sympathy on the side of the delinquent against the law.

His Lordship in Council will remark one important distinction between the law as we have framed it, and some other systems. Neither the English law, nor the French Code, extends any indulgence to homicide which is the effect of anger excited by words alone. Mr. Livingston goes still further. "No words whatever," says the Code of Louisiana, "are an adequate cause, no gestures merely shewing derision or contempt, no assault, or battery so slight as to shew that the intent was not to inflict great bodily harm."

We greatly doubt whether any good r^eason can be assigned for this distinction. It is an indisputable fact that gross insults by

word or gesture have as great a tendency to move many persons to violent passion, as dangerous or painful bodily injuries. Nor does it appear to us that passion excited by insult is entitled to less indulgence than passion excited by pain. On the contrary, the circumstance that a man resents an insult more than a wound is any thing but a proof that he is a man of a peculiarly bad heart. It would be a fortunate thing for mankind if every person felt an outrage which left a stain upon his honor more acutely than an outrage which had fractured one of his limbs. If so, why should we treat an offence produced by the blameable excess of a feeling, which all wise legislators desire to encourage, more severely than we treat the blameable excess of feelings certainly not more respectable?

One outrage which wounds only the honor and the affections is admitted by Mr. Livingston to be an adequate provocation. "A discovery of the wife of the accused, in the act of adultery with the person killed, is an adequate cause." The law of France, the law of England, and the Mahomedan law, are also indulgent to homicide committed under such circumstances. We must own that we can see no reason for making a distinction between this provocation and many other provocations of the same kind. We cannot consent to lay it down as an universal rule that in all cases this provocation shall be considered as an adequate provocation. Circumstances may easily be conceived which would satisfy a Court that a husband had in such a case acted from no feeling of wounded honor or affection, but from mere brutality of nature, or from disappointed cupidity. On the other hand, we conceive that there are many cases in which as much indulgence is due to the excited feelings of a father, or a brother, as to those of a husband. That a worthless, unfaithful, and tyrannical husband should be guilty only of manslaughter for killing the paramour of his wife, and that an affectionate and high-spirited brother should be guilty of murder for killing in a paroxysm of rage the seducer of his sister, appears to us inconsistent and unreasonable.

There is another class of provocations which Mr. Livingston does not allow to be adequate in law, but which have been, and, while human nature remains unaltered, will be adequate in fact to produce the most tremendous effects. Suppose a person to take indecent liberties with a modest female in the presence of her father,

her brother, her husband, or her lover. Such an assault might have no tendency to cause pain, or danger; yet history tells us what effects have followed from such assaults. Such an assault produced the Sicilian Vespers. Such an assault called forth the memorable blow of Wat Tyler. It is difficult to conceive any class of cases in which the intemperance of anger ought to be treated with greater lenity. So far, indeed, should we be from ranking a man who acted like Tyler with murderers, that we conceive that a Judge would exercise a sound discretion in sentencing such a man to the lowest punishment fixed by the law for manslaughter.

We think it right to add that, though in our remarks on this part of the law we have used illustrations drawn from the history and manners of Europe, the arguments which we have employed apply as strongly to the state of society in India as to the state of society in any part of the globe. There is perhaps no country in which more cruel suffering is inflicted, and more deadly resentment called forth, by injuries which affect only the mental feelings.

A person who should offer a gross insult to the Mahomedan religion in the presence of a zealous professor of that religion, who should deprive some high-born Rajpoot of his caste, who should rudely thrust his head into the covered palanquin of a woman of rank, would probably move those whom he insulted to more violent anger than if he had caused them some severe bodily hurt. That on these subjects our notions and usages differ from theirs is nothing to the purpose. We are legislating for them, and though we may wish that their opinions and feelings may undergo a considerable change, it is our duty, while their opinions and feelings remain unchanged, to pay as much respect to those opinions and feelings as if we partook of them. We are legislating for a country where many men, and those by no means the worst men, prefer death to the loss of caste; where many women, and those by no means the worst women, would consider themselves as dishonored by exposure to the gaze of strangers: and to legislate for such a country as if the loss of caste, or the exposure of a female face, were not provocations of the highest order, would, in our opinion, be unjust and unreasonable.

CALCUTTA HIGH COURT.

THE 27TH NOVEMBER, 1880.

*Before Mr. Justice Mitter and Mr. Justice Maclean.*BABOOJAN JHA(1) (*Judgment-Debtor*) v. BYJNATH DUTT JHA
AND OTHERS (*Decree-holders*).*Execution-Proceedings—Mesne Profits—Amount awarded in Execution
larger than that claimed in Plaintiff—Court Fees Act (VII of 1870),
s. 11, para. 2.*

The plaintiff brought a suit for possession, and for a certain sum as mesne profits, which he assessed at three times the annual rent paid to the defendant by tenants in actual possession of the land. He obtained a decree for possession, and the decree ordered that the amount of mesne profits due to him should be determined in the execution-proceedings. On an investigation, a larger sum was found to be due to him for mesne profits than that claimed by him in his suit. The plaintiff, therefore, paid the excess fee as provided by para. 2 of s. 11 of Act VII of 1870; but held, the amount of mesne profits recoverable by him must be limited to the amount claimed, in the plaint. * * * * *

THE judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

Mitter, J.—In this case the appellant has been adjudged liable for about Rs. 1,200 as mesne profits due for three years on account of the respondents' share, three annas, eight gundas, one dumri, in Mouza Juggut, for which the respondents got a decree on 24th July, 1878.

The only contention raised before us is, that the respondents are bound by the amount of mesne profits claimed by them in the plaint, viz., Rs. 309. * * * * *

We think that the general rule that a plaintiff cannot recover more than he claims in his plaint, ought not to be departed from except under special circumstances. The decision in the case of *Gooroo Doss Roy v. Bungshee Dhur Sein*(2) lays this down, as we think, correctly. In this case the plaintiffs appear to have been aware that the lands of which they sought possession were in the occupation of tenants paying an ascertained rent of Rs. 103 for plaintiff's share; that being so, the plaintiffs demanded damages at that rate on account of the loss they had sustained from the wrongful possession of the defendant. It would have been better if the first Court had not reserved the ascertainment of the mesne profits for execution, and our decision is, that the plaintiffs can recover no more than Rs. 309 for the years 1880—82.

The appeal will, therefore, be decreed with costs, which we assess at two gold-mohurs.

Appeal allowed.

S. 300.

257. Where the prisoner knocked his wife down, put one knee on her chest, and struck her two or three violent blows on the face with the closed fist, producing extravasation of blood on the brain, and she died in consequence, either on the spot, or very shortly afterwards.

Held, that there being no intention to cause death, and the bodily injury not being sufficient in the ordinary course of nature to cause death, the offence committed by the prisoner was not murder, but culpable homicide not amounting to murder.—*Reg. v. Govinda. I. L. R., 1 All., 342.*

258. The High Court, as a Court of reference, can only deal with cases in which a sentence of death has been passed.

The prisoners, fearful of being punished if they allowed him to escape, and thinking that they were acting lawfully, in furtherance of a plan arranged for them by a Police Constable and the lumbardar of a village for the capture of an outlaw, for whose arrest a reward had been offered, and in pursuance thereof killed him, while endeavouring to escape.—*Held*, that, the offence committed came under the third exception in s. 300 of the Indian Penal Code, and was culpable homicide not amounting to murder.—*Queen v. Aman and Nand Kishore. 5 N. W. P., 130.*

259. A charge under s. 302, Penal Code, need not set out all the facts necessary to constitute the offence of murder, and negative all the exceptions contained in s. 300.—*5 W. R., R. C., 1; ib. Cr. 2. 4 W. R., Cr., 35.*

S. 300. Exception 1.

260. To give an accused the benefit of Exception 1, s. 300, Penal Code, it ought to be shown distinctly not only that the act was done under the influence of some feeling which took away from the person doing it all control over his actions, but that that feeling had an adequate cause.—*10 W. R., Cr., 26.*

S. 300. Exception 4.

261. An unpremeditated assault committed in the heat of passion upon a sudden quarrel, and ending in an affray in which death was caused, was held to come within Exception 4, s. 300, Penal Code.—*1 W. R., Cr., 33.*

262. What is necessary to bring a case of murder under the same exception, so as to change the offence into culpable homicide not amounting to murder.—3 W. R., Cr., 29.

263. Drunkenness is no excuse for throttling a man to death, so as to bring the case within exception 4, s. 300, Penal Code.—5 W. R., Cr., 58.

S. 302.

264. A person guilty of dacoity, with murder, is punishable under s. 396, Penal Code, and not separately for murder, under s. 302, and for dacoity, under s. 395.—W. R., Sp., Cr., 30.

265. Where it appeared that the prisoner, a Rajput, had allowed his female child, after the mother's death, to gradually languish away, and die from want of proper sustenance, and had persistently ignored the wants of the child, although repeatedly warned of its state, and the consequence of his neglect of it, and there was nothing to show that the prisoner was not in a position to support the child,—*Held*, that the offence which the prisoner committed was murder, and not simply culpable homicide not amounting to murder.—*Queen v. Ganga Singh*. 5 N. W. P., 44.

266. A charge under s. 302, Penal Code, need not set out all the facts necessary to constitute the offence of murder, and negative all the exceptions contained in s. 300.—5 W. R., R. C., 1; *ib.*, Cr., 2.

267. The finding that the violence used was not such as the prisoner must have known to be likely to cause death, is not a ground for acquitting of culpable homicide not amounting to murder and convicting of causing death by rashness or negligence under s. 304. Culpable rashness and culpable negligence distinguished.—7 Mad. H. C. R., 119.

268. Where a prisoner was charged under ss. 304, 325, and 323, Penal Code, and the Jury brought in a verdict of guilty under s. 335,—*Held*, that he was not acquitted of grievous hurt, but found guilty of the offence described in s. 322, with the extenuating circumstances which would confine the punishment within the limits specified in s. 335.—23 W. R., Cr., 61.

S. 304 A.

269. Where there was medical evidence to show that milk had been administered to a child in such quantities as to kill it,

but there was no evidence to show that the milk was administered by the orders of a mother, or that she knew the quantity that was being administered.—*Held*, that there was not sufficient evidence to bring her within s. 304 A. of the Indian Penal Code.

The Sessions Judge found, that the mother could not have been ignorant of the fact that her child was being over-fed, or of the probable consequences of such over-feeding; and such feeding was inconsistent with the terms of the s. 304 A., which provides for the causing of death by any rash or negligent act, not amounting to murder. What a man does with the knowledge that the consequences will be likely to cause death cannot be reduced to a simply rash and negligent act.—*Queen v. Mussamat Pem Koer*. 5 N. W. P., 38.

270. The prisoner assaulted a thug so severely that he died. One hundred and forty-one marks of separate blows were found on the body of the deceased, and several of his ribs were broken.—*Held*, that s. 304 A. of the Indian Penal Code was not applicable to the circumstances of the case, and that, taking the offence out of the category of murder, it must still come under s. 304.—*Queen v. Man*. 5 N. W. P., 235.

271. In the course of a trivial dispute the accused gave the deceased a severe push on the back, which caused him to fall to the road below, a distance of two and a half cubits. In falling, the deceased sustained an injury from which tetanus resulted, which caused his death on the fifth day after.

Held, that on these facts, the accused was not guilty of the offence described in s. 304A. of the Penal Code, nor of culpable homicide not amounting to murder, because there was no likelihood of the result following, and *á fortiori*, no designed causing of it.—*Regina v. Acharjya*. I. L. R., 2 Bom., 224.

272. An Assistant Commissioner in Chota Nagpore was held to have no jurisdiction to try a case of culpable homicide not amounting to murder, under s. 304 A., Penal Code (s. 12, Act XXVII of 1870).—18 W. R., Cr., 23.

S. 307.

273. In order to constitute offence of attempt to murder under s. 307 of the Indian Penal Code, the act committed by the prisoner

must be an act capable of causing death in the natural and ordinary course of events.

Aliter.—Under s. 511, taken in connection with ss. 299 and 300.

Therefore, where the prisoner presented an uncapped gun at E. G. (believing the gun to be capped) with the intention of murdering him, but was prevented from pulling the trigger.—*Held*, that he could not be convicted of an attempt to murder, upon a charge framed under s. 307 of this Code; but that, under the same circumstances, he might be convicted upon a charge of simple attempt to murder, framed under s. 511 in connection with ss. 299 and 300.

Apparent inconsistency between the English law, with reference to attempts as laid down in *Reg. v. Collins*, and the provisions of the I. P. C. explained.—*Reg. v. Francis Cassady*. 4 Bom. H. C. R., 17.

274. The knowledge that an act is likely to cause death does not constitute culpable homicide not amounting to murder. It must be shown that the act was committed with the knowledge that it must in all probability cause death.—*Queen v. Girdhari Singh*. 6 N. W. P., 26.

S. 309.

275. A prisoner found guilty under this section of an attempt to commit suicide, must be sentenced to some imprisonment, and not merely to payment of a fine.—*Reg. v. Chenvira*. 1 Bom. H. C. R., 4.

S. 312.

276. In a case in which the child was full grown, the Conrt declined to convict the accused of causing miscarriage under s. 312, Penal Code, but convicted them of an attempt to cause miscarriage under ss. 312 and 511.—19 W. R., Cr., 32.

S. 317.

277. S. 317, Penal Code, contemplates cases in which the death of a child is caused from cold or some other result of exposure.—10 W. R., Cr., 52. See also 16 W. R., Cr., 12.

S. 318.

278. Upon a prosecution under s. 318 of the Penal Code, a person cannot be convicted of concealing the birth of a child in the case of a mere *fœtus* four months old.—4 Mad. H. C. R., 63.

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THE
LEGAL COMPANION.
MARCH, 1881.
CALCUTTA HIGH COURT.

THE 13TH JULY, 1880.

Before Mr. Justice R. C. Mitter, and Mr. Justice Alexander Thomas Maclean.

GYA RAM GHOSE, one of the Defendants, *Appellant*
versus.

WOOMESH CHUNDER ROY, Plaintiff, *who appeared*, and DATARAM ROY No 1
and MOOKTARAM ROY No. 2, Defendants who did not appear in this
appeal, *Respondents.*

Money decree, Effect of—Prior lien.

The mere taking of a money decree does not extinguish the creditor's lien under the mortgage-bond.

We think that in this case the judgment of the Lower Appellate Court must be reversed. It is quite clear that Gya Ram by obtaining a money decree did not thereby lose the benefit of his prior lien. That was laid down in the Full Bench decision reported in Vol. XXIII, Weekly Reporter, p. 186. So it is clear that the present decision of the Subordinate Judge is in conflict with the Full Bench decision referred to above, and the learned pleader for the respondent fairly admits that he cannot support the decision. That decision therefore must be set aside and we remand the case to enquire, first, what was due to Gya Ram under his mortgage-bond, dated the 7th of Assin 1279, on the date on which he took possession of the property mortgaged after it was sold in execution of his decree. That being ascertained, a decree is to be made declaring that the property hypothecated in both the bonds of the plaintiff and of the defendant should be sold free of the incumbrances created by both these documents, the defendant Gya Ram is to be satisfied first of the amount which might be found due under the inquiry which we have directed. From the balance the plaintiff is to be satisfied of the debt due to him under his bond, and if there is any surplus left it is to be paid over to the original debtors, the defendants Nos. 1 and 2.

We think the special appellant is entitled to his costs as against the plaintiff, Woomesh Chunder Roy.

CALCUTTA HIGH COURT.

THE 20TH AUGUST, 1880.

*Before Mr. Justice G. G. Morris, and Mr. Justice H. T. Prinsep.*MUSST. KALITARA CHOWDHURI, *Decreeholder, Appellant*
*versus*RAM COOMAR GOOPTA, *Debtor, Respondent.**Sale Proclamation—How to be published—Material Irregularity.*

The sale proclamation to be properly made must be affixed on some conspicuous part of the property attached. If in consequence of the sale proclamation not being so made there is a paucity of bidders and the property is sold at a grossly inadequate price, the defect in the mode of publishing the proclamation is a material irregularity which will vitiate the sale.

THE following extract is from the judgment of the High Court :—

So far as the evidence goes, we think it clear that the price realised was very much below the proper value of the property sold. It is on record that in addition to the decreeholder who purchased, there were only two bidders, and this paucity of bidders no doubt accounts for the unfortunate result.

Substantial injury to the debtor is, therefore, established, but the law (s. 312) also requires that such substantial injury must have been the result of some material irregularity proved to have taken place in publishing or conducting the sale. In the present case, the irregularity complained of is stated to have been the omission to publish the sale proclamation on the property attached by affixing it to some conspicuous place thereon. The terms of the judgment of the Subordinate Judge raise considerable doubt as to his finding on this point, but so far as we understand that judgment, he has found that the sale proclamation was never made by beat of drum near the debtor's cutchery, and the reason he assigns for this finding, is that the peon in his report made no mention of that cutchery. The Subordinate Judge apparently disbelieves the evidence, and especially that of the peon himself as being in contradiction to that report. Whether the Subordinate Judge finds that the sale proclamation was fixed on a tree in Rampore Haut is doubtful. He seems rather to have held that whether this was so or not was immaterial, because Rampore Haut being beyond the limits of the property attached, that would not be a lawful act. The evidence regarding the position of Rampore Haut with respect to the attached property is not clear. There certainly is evidence that it belongs

to Mahommud Gazee, but none that it does not form part of the attached property, which it may be noted is only a $2\frac{1}{2}$ anna share, and it may be that the debtor holds this share conjointly with Mahommud Gazee. In his petition of appeal, the judgment creditor appellant now here states that Rampore Haut is a part of the property attached. It may be that it is not, and that the parties before the Subordinate Judge did not dispute this point. At all events the appellant, as represented before us by the learned Advocate-General, is not prepared to give us any information on it.

Reading s. 289 with s. 274 we are of opinion that the sale proclamation cannot properly be made unless it be affixed on some conspicuous part of the property attached. Here the evidence shows that the sale proclamation, though made by beat of drum near the debtor's cutchery, yet was not affixed on the cutchery itself, but only on a Barh Tree in Rampore Haut, the exact position of which with reference to the attached property is doubtful. As to this, it is contended before us that it is shown that this omission or irregularity was the direct cause of the small price bid at the sale. If strict proof were required of this, a sale would, rarely, if ever, be set aside, although the gravest irregularity might have been committed and although a grossly inadequate price might have been obtained.

The first evidence on the point would no doubt be that of a person stating that he was prepared to attend and bid for the property, but that although he was cognisant of the attachment, he was not informed of the sale, because no proclamation had been fixed upon any portion of the property. But it would be impossible for a Court always to insist on such strict proof, because the debtor would be nearly always unable to obtain it, even if such evidence did exist.

Whenever, therefore, there is very great inadequacy in the price obtained, and there is also proof that there has been some material irregularity in the sale proceedings, a Court is always inclined to connect one with the other, and to presume that the substantial injury has been the result of the irregularity. Such is the principle on which the case reported in Indian Law Report 3 Cal., p. 542, was decided. Some cases have been brought to our notice in which the Court required strict proof rather than presumption, but each case must be decided on the particular facts established. In the present case, we differ from the Lower Court regarding the procla-

mation of sale not having been made by beat of drum on the attached property near the debtor's cutchery, but we think that it has not been affixed in the manner required by law on any conspicuous spot within the attached property, because it has been left in doubt whether the Barh Tree in Rampore Haut is or is not within that property. If Rampore Haut is not within the attached property, then in our opinion, there has been a material irregularity in the proclamation of sale, which may reasonably be presumed to have caused the extreme inadequacy of price which constitutes the substantial injury sustained by the debtor. The case will, therefore, be sent to the Subordinate Judge in order that the parties may have an opportunity of submitting evidence before him on this issue, Is the Barh Tree in Rampore Haut within or without the attached property? After taking such evidence as the parties may produce, Subordinate Judge will return the record with his findings for the orders of this Court.

CALCUTTA HIGH COURT.

THE 28TH JUNE, 1880.

Before Mr. Justice J. S. White and Mr. Justice C. D. Field.

SREEMUTTY HURRO SOONDREE DASSEE, widow of Joy Chunder Dutt, and
GOUR KISHORE DUTT, *Judgment-debtors, Appellants,*
versus

JUGGO BUNDHOO DUTT, who appeared, and PROSONNO KUMAR DUTT and
others, *Decree-holders, Respondents.*

*Restitution of property taken in execution of decree—Application
for execution—Res Judicata.*

A Court of first instance has full authority and is bound to execute the order of the Appellate Court, reversing its own order, and if before the reversal anything has been done under its own order, it has full authority and is bound to undo what has been so done and to put the parties back into precisely the same position as they stood before its own order was made.

The refusal of an application to execute a decree is not a bar to a second application being made for the execution of the same decree.

In this case the decree-holders had obtained in execution the possession of property decreed to them, but the judgment-debtors succeeded in getting a reversal of the order for execution on the ground of limitation, and then applied to be restored to possession.

The following is an extract from the judgment of the High Court:—

Very shortly after the appellants obtained the reversal of the order for execution, they on the 6th of November 1878

made a similar application to the one that they made in May 1879, namely, to be restored to possession of the land. The Moonsiff on that occasion instead of making the order merely directed, as he did on the 23rd May 1879, that a notice should be given calling upon the respondents to give up possession. His reason for making the order in that limited form was that he could find no section in the Civil Code which directed that, when a decree which had been executed is reversed, restitution should be made, or which provided any machinery for effecting the restitution. The reason is altogether insufficient. There was no occasion to resort to any section of the Code in order that a First Court may give effect to the order of an Appellate Court reversing its own order. It has full authority and is moreover bound to execute the order of the Appellate Court; and if before the reversal anything has been done under its own order, it has full authority and is moreover bound to undo what has been so done and to put the parties back into precisely the same position as they stood before its own order was made. No appeal was preferred by the appellants against the Moohsiff's order of the 6th of November 1878, but after waiting some time and not getting possession, they again applied to the Moonsiff to be put in possession. The Moonsiff refused that application (the ground on which he did so is not stated), but on that occasion the appellants did appeal to Mr. Dickens, the then Judge of Dacca. Mr. Dickens dismissed the appeal on the ground that it was out of time, but at the same time made some observations which the present Judge of Dacca thinks that the appellants misunderstood and which were that the proper course for the appellants to adopt was to apply to have effect given to the order of the 6th November, 1878.

The present Judge of Dacca is of opinion that the suggestion made in Mr. Dickens' order, when he dismissed the appeal, was a suggestion that the proper way of carrying out the order of the 6th November was to direct the issue and service of the notice mentioned in the order. He has accordingly in that view of the case dismissed the appeal, which was preferred to him against the order of the 23rd of May 1879, and he further states that in consequence of the order of the 6th November 1878, not having been appealed against by the appellants, it must be accepted as final and binding on the matter, and that whether it is right or wrong it is now *res judicata*.

It is not necessary to consider what Mr. Dickens meant when he made the suggestion referred to, because whatever might have been his intention, the appellants in May 1879 made a fresh application to be put in possession of the property which in our opinion ought to have been granted unless the order of the 6th of November is properly held to have the effect of a *res judicata*. It is not clear that the several applications ought to be treated as distinct applications, to be restored to possession, rather as one continued application, but taking them as even distinct applications, they were in substance applications for the execution of the Appellate Court's decree. It has been held by the Privy Council in IV Indian Appeals, page 127, that the refusal of an application to execute a decree is not a bar to a second application being made for the execution of the same decree. The precise ground upon which their Lordships' decision proceeded is not stated. Possibly it may have been that the refusal of the application was not to be considered as an adjudication on the point. But whatever their reasons may be, the case that I have cited is a clear authority that the application which the appellants made on the 23rd May 1879, is not barred by the refusal either of their application on the 6th November 1878 or of their intermediate applications between that date and the 23rd of May.

We have been referred to a case (appeal from appellate order No. 169 of 1878) in which my brother Mitter and myself held that a question decided in the course of prior execution proceedings was deemed *res judicata* and could not be raised again in subsequent proceedings. But that was a very different case from the present. There the question was as to the construction of a decree. It was raised by the judgment-debtor a second time after it had on a previous application for execution been decided in favor of the judgment-creditor and after the judgment-debtor had preferred an appeal against the decision, but had not thought fit to prosecute it.

The orders of both the Lower Courts must be set aside and we make the following order that the appellants be restored to the possession of the property of which the respondents were put in possession under the order for execution which has been reversed.

The appeal will, therefore, be allowed with costs. Vakeel's fee two Gold Mohurs.

BOMBAY HIGH COURT.

THE 19TH JULY 1880.

Before Mr. Justice Kemball and Mr. Justice F. D. Melvill.

EMPEROR(1) v. SHANKAR.

Falsification of record in order to conceal negligence—Forgery—Fraud—Indian Penal Code (XLV of 1860), s. 463, 464.

Falsification of a record made in order to conceal a previous act of negligence, not amounting to fraud, does not amount to forgery within the meaning of ss. 463 and 464 of the Indian Penal Code (Act XLV of 1860).

Kemball, J.—The appellant has been found guilty, by both Judge and assessors, of forgery in having fraudulently cancelled a cipher in an entry in the taluk forest day-book, and altered the same into a “2” without lawful authority. That an alteration has been made, there is no doubt, but there is no direct evidence that it was made as alleged by the appellant, and his guilt has been assumed mainly on his examinations before the committing Magistrate and in the Session Court, and upon the probabilities of the case. Both Judge and assessors have laid great stress on these examinations; in fact, the Judge held that they formed very strong evidence of the appellant’s guilt, and inserted a copy of each examination as part of his judgment. On this part of the case we may observe that, in our view of the circumstances we are unable to concur in the conclusion drawn from these examinations, and we think it necessary to add that we cannot regard with approval the manner in which the examination in the Session Court was conducted.

The whole case seems to us to turn on the question whether any fraud was perpetrated in the matter of the auction-sale; for, in the absence of satisfactory evidence of such fraud, not only does the ground, on which the Judge based his assumption that appellant made the alteration, disappear, but, as was admitted by Mr. Náná-bhai in argument, if the sale was free from fraud, the alteration of the books imputed to the appellant would not amount to forgery within the meaning of ss. 463 and 464 of the Indian Penal Code.

(1) *Vide I. L. R., 4 Bom. 657.*

Note by the Editor.—The subsequent falsification of an office book by the person in charge thereof for the purpose of concealing frauds previously committed, *merely with a view to avoid disgrace and punishment*, held not to fall within the definition of forgery as given in the Indian Penal Code. 6 N.W.P., H.C. Rep. 56.

On the point, then, of fraud the case has been very fully argued before us, and we have been unable to discover any evidence to support the conclusion arrived at by the Judge. The sale was made by public auction, and there is absolutely nothing to show, nor, indeed, is it even suggested, that appellant had any interest in either defrauding the Government or benefiting Rámayá, the purchaser. We observe that the committing Magistrate was of opinion that the sale was not fraudulent, though his view was that appellant had entered a less quantity of wood in his report to save himself the trouble of having to explain why it fetched so little. The evidence as to the circumstances of the sale is not very clear; but it is not, we think, proved that the appellant knowingly made a false report on the point, and we incline to the view taken by his official superior, Mr. Stobie, that his fault was that of negligence in not having the wood re-measured prior to delivery, when he could have formed a correct estimate of the actual quantity sold. It may be that Rámayá had in his possession more wood than was entered in the report and other documents, though we do not with the Judge find it to be a matter beyond dispute that it was more than two khandis; however that may be, it is evident that a large portion of the tree, which it is said was included in the sale, was quite useless, and we see no reason to doubt the correctness of the committing Magistrate's opinion, that a fair value for the wood was paid in the position it was in the jungle. No doubt, the appellant has acted very foolishly after the acting mámlatdár commenced to make his inquiries, and a certain amount of suspicion, consequently, attached to him, though there is much in the argument, that if he had had an interest in making the alteration, he would hardly have gone about it in so very clumsy a way. On the whole, we are of opinion that there is no sufficient ground for assuming that the appellant made the alteration in the forest book, and that, if he did do so; that his act was not forgery. For these reasons we reverse the conviction and sentence, and direct the appellant's discharge. The fine, if levied, to be re-paid.

Conviction reversed.

CALCUTTA HIGH COURT.

THE 27TH AUGUST 1880.

Before Mr. Justice James Sewell White and Mr. Justice Charles Dickenson Field.

CHATRAPUT SINGH, *Plaintiff, Appellant,*
versus

GRINDRA CHUNDER ROY and another, *Defendants, Respondents.*

*Liability of Auction Purchaser at execution-sale to pay Government Revenue,
falling due after purchase.*

Government Revenue does not become due from day to day but at certain specified times according to the contract of the parties or the custom of the district. The same is the case with Road Cess and Public Works Cess which are payable along with and under the same conditions as revenue. Where, therefore, a person bought certain property at an execution-sale on a particular date, and the revenue and cesses although accruing from an earlier date did not become due until after the purchase, *held*, in the absence of express stipulation to the contrary, that the purchaser was liable to discharge the whole amount of the payments and could not make the judgment-debtors who were the previous owners pay any portion of them.

Revenue and the Public Cesses mentioned above constitute a standing incumbrance and first charge upon the land subject to them. A man who purchases an estate which pays revenue and cesses to Government knows that the estate is by the law chargeable with this revenue and cesses, whether in arrear or accruing, and that unless he pays the same, he will lose his purchase. In the absence of any express stipulation to the contrary in the proclamation of sale, he must be taken to purchase the estate subject to the discharge of these liabilities.

Mr. Justice White.—The appellant was the plaintiff in the Lower Court, and that Court dismissed his suit without going into evidence. The question therefore to be determined upon this appeal is whether in his plaint he stated a case which, if proved, would entitle him to the relief which he sought against the defendants. The following are the material allegations in his plaint: that on the 9th of December 1878 he purchased an 8 annas share of a large zamindary under a decree that was obtained against the defendants; that after that date a large sum of money became due in respect of the 3rd quarter's Government revenue for the year 1878-79, and also in respect of the Road Cess and Public Works Cess for the same quarter; that on the 13th January 1879, the last day for paying the same, he had paid the entire amount into the Government Treasury; that prior to the date of his auction-purchase, he had no right in the property which he had bought;

that the defendants, down to the 8th of December 1879, were owners of the mehal sold, and entitled to realize rent from the tenants, and that he was compelled, in order to save his interest in the mehal, to pay the amount that so became due for revenue and cesses.

His plaint prays for a declaration that he is entitled to recover from the defendants a proportionate amount of the Government revenue, Road Cess and Public Works Cess payable in respect of the mehal from the 28th of September, to the 8th of December 1878, and for a decree for that proportionate amount.

It is admitted by the appellant that his title to the 8 annas share of zemindary dates from his purchase, namely, the 9th December 1878, and that the revenue and cesses which he seeks to apportion, although accruing from an earlier date, did not become due until after the 9th of December 1878, when the 8 annas share had, by virtue of the purchase, become vested in himself. It is also admitted by his pleader that the sale was not made under the Revenue Sale Law. Government revenue does not become due from day to day but at certain specified times according to the contract of the parties, or the custom which may prevail in the district. The same remark applies to the cesses mentioned in the plaint, which are payable along with and under the same conditions as revenue. Therefore the liability to pay revenue in this case was a liability which first became due after the appellant had acquired his title. As the payments did not become due until after he had become owner of the estate, and he bought under no special stipulation which allowed of the payments being apportioned, I am of opinion that the doctrines neither of contribution nor of apportionment apply, but that he is liable to discharge the whole amount of the payments, and cannot make the judgment-debtors pay any portion of them.

There is another view of the case presented by the Lower Court, which to my mind seems also a sound one, namely, that, upon the facts alleged, the plaintiff must be held to have purchased at the auction the 8 annas share of the mehal with all revenue and cesses that may be either due or accruing due at the time of his purchase. Revenue and the Public Cesses mentioned constitute a standing incumbrance and first charge upon the land subject to them. A man who purchases an estate which pays revenue and cesses to Government knows that the estate is by the law chargeable with

the revenue and censes, whether in arrear or accruing, and that unless he pays the same, he will lose his purchase.

In the absence of any express stipulation to the contrary in the proclamation of sale, he must be taken to purchase the estate subject to the discharge of these liabilities. A purchaser can easily, and I have no doubt, does protect himself from these liabilities by taking them into account in estimating the value of what he is about to buy and regulating his biddings accordingly.

The proposition is supported by an authority. The Lower Court refers to the cases reported in the Gap No. of the Weekly Reporter for 1864, pages 73 and 207, and we are also referred to another case decided by Mr. Justice Louis S. Jackson and Mr. Justice McDonnell on the 20th January 1876, special appeal No. 270 of 1875. The authorities in Gap No., pages 73 and 207, although not cited in the judgment of Mr. Justice Jackson, are yet cited in the judgment of the Lower Court then under appeal, and are approved of by the High Court.

The appeal is dismissed with costs.

N.-W. P. HIGH COURT.

THE 11TH JUNE 1879.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

KANTHI RAM (*Judgment-debtor*)⁽¹⁾

versus

BANKEY LAL and others (*Decree-Holders*).

Execution of Decree—Application to set aside sale of immoveable property—

Auction-purchaser—Appeal—Act X of 1877, (Civil Procedure Code), ss. 311, 312, 313, 588 (m).

Held that, although the auction-purchaser may not apply under s. 311 of Act X of 1877 to have a sale set aside, he yet may be a party to the proceedings after an application has been made under that section, and then, if an order is made against him, he can appeal from such order under s. 588 (m) of Act X of 1877.

THE facts of this case, so far as they are material for the purposes of this report, were as follows:—Certain property was sold on the 23rd August 1878, in the execution of a decree against one Kanthi Ram and other persons. On the 6th September 1878, the judgment-debtors applied to the Court of first instance to

(1) *Vide I. L. R., 2 All, 396.*

set aside the sale on the ground of material irregularities in publishing and conducting it. This application was opposed by Mangni Ram, the auction-purchaser, who contended that there had been no such irregularities in publishing and conducting the sale as alleged by the judgment-debtors. The Court of first instance found on the issue raised by this contention, that the sale had been irregularly published, and made an order setting it aside. The auction-purchaser appealed to the District Judge, who, finding that the sale had not been improperly published or conducted, reversed the order of the Court of first instance.

The judgment-debtor Kanthi Ram applied to the High Court for the exercise of its powers of revision under s. 622 of Act X of 1877, contending that the District Judge had exercised an appellate jurisdiction not vested in him by law, and that his order should be set aside.

Munshi Sukhram for the petitioner. The junior Government pleader (Babu Dwarka Nath Banerji) for the opposite party. The judgment of the Court was delivered by

Spankie, J.—At first sight it appears as if the first plea had force, and that the auction-purchaser was not competent to appeal to the Judge. By s. 311 of Act X of 1877 the decree-holder or any person whose immoveable property has been sold, may apply to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting the sale. By s. 312 if no such application be made, or if it be made and the objection should be disallowed, the Court shall confirm the sale as regards the parties and the purchaser. If such application be made, and if it be allowed, the Court shall set aside the sale.* Now it is clear that the decree-holder or any person whose immoveable property has been sold alone may make the application to set aside the sale. The purchaser cannot *apply* under this section. S. 313 provides for the occasion on which he may apply, *viz.*, on the ground that the person whose property purported to be sold had no saleable interest in it. S. 588 (m) gives an appeal under s. 312 for confirming or setting aside a sale. But suppose that the sale in favour of the purchaser has been confirmed, after objection has been disallowed under s. 312, and the judgment-debtor appeals to the Judge, cannot the purchaser appear in appeal and defend the order made in his favour? It would be very hard if he could not appear. Again, if it is part of

the Court's duty where an objection has been disallowed, to confirm the sale as regards the parties to the suit and the purchaser, it is surely a part of the Court's duty to hear the purchaser if he appear to answer the judgment-debtor or decree-holder's objection to the sale, and if he be heard in the first Court, may he not be heard in the second, and, if so, why not as appellant as well as respondent?

In this case the judgment-debtor made the objection. The auction-purchaser put in a statement refuting the grounds upon which the objection was made. The statement was admitted by the Court, and he was allowed to examine four witnesses. The order of the Court was against him. An appeal is allowed by law, and he appeared before the Judge as appellant. We can find no illegality in the Court's entertainment of this appeal on the merits, in that we hold that, though the auction-purchaser may not be the *applicant* under s. 311, he yet may be a party to the proceedings after the application has been made, and then if there is an order against him, he can appeal under letter *m*, s. 588 of the Code.

BOMBAY HIGH COURT.

THE 23RD SEPTEMBER 1879.

Before Mr. Justice M. Melvill and Mr. Justice Pinhey.

CHHAGANLAL NAGARDAS,(1) *Plaintiff,*

versus

JESHAN RAV DALSUKHRAM, *Defendant.*

Jurisdiction—Personal property—Court of Small Causes—Suit by decree-holder.

A suit by a decree-holder to establish his right to attach and sell moveable property as belonging to his judgment-debtor, is not a suit for personal property within the meaning of s. 6 of Act XI of 1865, and Mofussil Court of Small Causes has no jurisdiction to entertain it, even though the value of the property be such as to fall within its pecuniary limit.

THIS was a case stated by S. H. Phillipotts, Judge of Ahmedabad, under s. 527 of the Code of Civil Procedure.

The plaintiff's deceased father obtained a decree in the Small Cause Court of Ahmedabad against one Jagjivan, and in execution thereof attached certain moveable property, valuing it at Rs. 60-5-3. The defendant Jeshan Rav intervened, alleging that

(1) *Vide I. L. R., 4 Bom., 503.*

the property had been sold to him, and the attachment was in consequence removed. The plaintiff thereupon brought the present suit, and presented his plaint in the Court of the Subordinate Judge (First Class) at Ahmedabad. The plaint was, however, returned by the Joint Subordinate Judge, who was of opinion that he had no jurisdiction. The plaintiff next presented his plaint to the Judge of the Court of Small Causes, who held that he had no jurisdiction. The plaintiff, therefore, went back to the First Class Subordinate Judge, but he refused to alter the previous decision of the Joint Subordinate Judge. An appeal was, therefore, made to the District Judge, who, in referring the case for the orders of the High Court, said : "I am of opinion that the Small Cause Court has jurisdiction, as I can conceive no reason for any difference being made between this and the converse case, and the High Court have decided in *Gordhan Prema v. Kasandás*(1) that the suit brought by a defeated claimant, under s. 283 of Act X of 1877, is cognizable by a Court of Small Causes."

There was no appearance in the High Court by either party.

The judgment was delivered by— .

Melvill, J.—It has been decided by the Court in *Nathu Ganesh v. Kálidás*(2) and *Gordhan Prema v. Kasandás*(3) that, whether under the old or the new Code, the suit of a claimant whose property has been attached, is cognizable by a Court of Small Causes when the property is moveable property of a value not exceeding Rs. 500. The reason for these decisions was that a suit, *by the owner*, for the recovery of attached property, may properly be regarded as a suit "for personal property." But a suit by a decree-holder, to establish his right to attach and sell certain property as belonging to his judgment-debtor, cannot be called a suit for personal property. The distinction is clearly pointed out in *Nathu v. Kálidás*, and it is there shown how this distinction explains the decisions of the Calcutta and Madras High Courts, which are there quoted. None of those decisions is in favour of the proposition that a suit by a judgment-creditor to establish his debtor's title is cognizable by a Court of Small Causes, and the ruling of this Court in *Jathabhan v. Bái Lakha*(4) is directly adverse to it. The District Judge

(1) I. L. R., 3 Bom., 181.

(2) I. L. R., 2 Bom. 365.

(3) I. L. R., 3 Bom. 179.

(4) 6 Bom. H. C. Rep., 27.

must be informed that this Court does not concur in the view taken by him, and, consequently, that the Subordinate Judge's order must be reversed, and the plaint received. It may, no doubt, as the District Judge observes, be somewhat anomalous that a Court of Small Causes should be able to try the suit of one claimant, but not that of the other, when the two suits arise out of the same circumstances, and involve the same issues; but the anomaly is caused by the wording of s. 6 of Act XI of 1865, and can only be removed by an amendment of that section.

CALCUTTA HIGH COURT.

THE 17TH NOVEMBER, 1880.

Present :

*The Hon'ble Sir Richard Garth, Chief Justice, and the Hon'ble
A. T. MacLean, Judges.*

RUSSICK LAL MULLICK, Petitioner.

Police Report—Summary trial—Procedure—Indian Penal Code,
ss. 182 and 211.

A Magistrate should not, except under exceptional circumstances, order a prosecution under s. 182 or s. 211 of the Indian Penal Code, on a mere Police Report, nor should he try a person summarily under s. 182, on the report of the Police that a charge of theft preferred by him against others was found to be false, the section applicable to such a case being s. 211.

When a charge is pronounced false by the Police, no proceedings should be taken by a Magistrate *suo motu*, until a reasonable interval has shown that the complainant accepts the result of the investigation..

THE following judgment was delivered by the High Court :—

In this case, the petitioner has been convicted on summary trial for an offence under s. 182 of the Penal Code. He ought to have been tried for an offence under s. 211, in which case he could not have been tried summarily and would have had a right of appeal. The former section applies to informations made to a public servant, the latter to false charges of an offence involving criminal proceedings.

The petitioner charged four persons with theft, and the Police, after investigating the charge, pronounced it false. On receipt of the report on 6th August, the Assistant Commissioner ordered the

Note.—This decision was followed in the case of *Balkrishna v. Kisansing*, extraordinary application No. 153 of 1879, decided by M. Melvill and Kemball, JJ., on the 10th of August, 1880.

petitioner to be prosecuted under s. 182 of the Penal Code, simply upon perusal of the report. There may be cases in which such a course is justifiable ; as, for instance, when the Police find that property said to have been stolen has not left the complainant's possession, or where a person said to have been wounded or killed is found to be unhurt ; but to order a prosecution on a Police report is often very unfair to the complainant, who may be able, and may wish, to prove that the investigation has been imperfect or even improper.

The petitioner was summoned to answer the charge, and on the 10th August he petitioned the Assistant Commissioner to be allowed to substantiate his own complaint. The Assistant Commissioner then held a consultation with the Muktars on both sides, and on perusal of the Police diaries, &c., adhered to the opinion that the charge was false. The petitioner was then tried by the Assistant Commissioner, and, it is needless to say, was convicted. It seems to us that the Assistant Commissioner would have done better, if he had transferred the case for trial to a Magistrate, who had not formed any opinion upon it, if there was one available. The petitioner cannot be said to have had a fair chance. He was precluded from giving his own evidence, and it would have been surprising if the witnesses whom he called for his defence had shaken the Assistant Commissioner's opinion already formed.

We think that, when a charge is pronounced false by the Police, proceedings should not be taken by the Magistrate, *suo motu*, until a reasonable interval has shown that the complainant accepts the result of the investigation, and takes no further steps. The petitioner's application of 10th August ought to have been treated as a complaint to the Assistant Commissioner, and the procedure laid down in ss. 144, 147 followed. Even then it would be undesirable to dismiss the complaint, and proceed against the complainant without hearing the witnesses, if he desired to call any. A complainant, who runs the risk of adding perjury to an offence under s. 211, may well be warned against the consequences ; but, on the other hand, a Magistrate may entirely fail to understand the rights of a case from the complainant's own account of it ; and without hearing the complainant's witnesses, it may be impossible to understand it properly.

To act merely upon the report of the Police, as the Magistrate has done in this instance, and upon the strength of that report to turn the tables upon the complainant, and to put him upon his defence for making a false charge, without hearing first what he and his witnesses have to say, is extremely unfair. It is virtually allowing the Police to reverse the whole course of the proceedings, and after such an enquiry, as they (the Police) may have thought proper to make, to shut the complainant's mouth, and place him in the position of an accused person, without giving him an opportunity of making good his charge.

We, therefore, consider that in this instance the conviction is improper and must be set aside; and we direct the immediate discharge of the petitioner.

N.-W. P. HIGH COURT.

THE 5TH SEPTEMBER, 1879.

Before Mr. Justice Straight.

EMPEROR OF INDIA (1)

versus

KASHI.

Act X of 1872 (Criminal Procedure Code), s. 215—Examination of witnesses named for the prosecution—Discharge of accused without examining all the witnesses.

Before a Magistrate discharges an accused person under s. 215 of Act X of 1872, he is bound, under that section, to examine all the witnesses named for the prosecution. *Emperor v. Himaulla* (2) followed.

THIS was a case reported to the High Court by Mr. R. G. Currie, Sessions Judge of Gorakhpur, for its orders. One Kashi who had been accused of an offence under s. 211 of the Indian Penal Code, had been discharged by Mr. J. H. Carter, the Magistrate trying him, without the evidence of all the witnesses named for the prosecution being taken. In reporting the case the Sessions Judge suggested that the order of discharge should be allowed to stand, as it did not appear that there had been any miscarriage of justice or material error sufficiently requiring the re-trial of the accused.

(1) *Vide I. L. R., 2 All. 447.*

(2) *I. L. R., 3 Calc. 389.*

Straight, J.—I regret that I feel myself prevented by the terms of s. 215, Criminal Procedure Code, from adopting the suggestion of the Sessions Judge. The words of the explanation are plain and positive, and establish, as a condition precedent to a discharge, the examination of all the witnesses named. It is impossible for me to say whether Mr. Carter was right or wrong in the view he took of the case, but he was clearly in error in determining it without satisfying the directions of s. 215. This point has already been made the matter of decision twice in this Court, in the cases of *Empress v. Tantia*(1) and *Empress v. Bohdram*(2) decided 28th July, 1879. In both of those, I followed the authority of *Empress v. Himatulla*,(3) with which I may add I entirely agree. I must therefore set aside Mr. Carter's order of discharge, and direct him to reopen the case, and examine the further witnesses named, and then pass such order in the matter as the whole of the evidence may appear to call for.

N.-W. P. HIGH COURT.

THE 9TH JUNE, 1879.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

KANAHIA LALL(4) and another (*Plaintiffs*)

versus

KALIDIN (*Defendant*).

Registration—Certificate of Sale—Mortgage.

Where the Subordinate Judge of Dehra Dūn made and signed the following endorsement on a deed of mortgage of immovable property :—"This deed was purchased on the 1st December, 1875, at a public sale in the Court of Dehra Dūn, by N. and K., plaintiffs, for Rs. 2,400, under special orders passed by the Court on the 23rd November, 1875, in the case of N. and K., plaintiffs, against R., for self, and as guardian of the heir in possession of the estate left by M."—*Held* per Spankie, J., that this instrument operated as a sale certificate, and consequently, as it related to immovable property of the value of Rs. 100 and upwards, it required to be registered.

Held per OLDFIELD, J.—That as the instrument operated to assign the deed of mortgage to the auction-purchasers, it for the same reason required to be registered.

THIS WAS A SUIT FOR THE POSSESSION OF A PLOT OF LAND APPERTAINING TO THE PREMISES OF THE VICTORIA HOTEL AT DEHRA DŪN. THE

(1) Legal Remembrancer, N.-W. P., Vol. I, II.

(2) Unreported.

(3) I. L. R., 3 Calc., 389.

(4) Vide I. L. R., 2 All. 392.

facts of the case, so far as they are material for the purposes of this report, were as follows: The plaintiffs claimed the land in virtue of a transfer to them by sale in the execution of a decree of a certain deed of mortgage of the Victoria Hotel and premises, dated the 26th September, 1866. They relied on an endorsement on this deed as the proof of their title. That endorsement was in the following terms: "This deed was purchased on the 10th December, 1875, at a public sale held in the Court of Dehra Dūn, by Narain Das and Kanahia Lall (plaintiffs) for Rs. 2,400, under special orders passed by the Court on the 23rd November, 1875, in the case of Narain Das and Kanahia Lall against Richard Powell for self and as guardian of the heir in possession of the estate left by Matilda Powell."

This endorsement was signed by the Subordinate Judge of Dehra Dūn. The defendant contended that the endorsement should have been registered as it was an instrument operating to assign an interest in immovable property of the value of upwards of Rs. 100. The plaintiffs contended that the endorsement was the order of a Court only and did not require registration. The Subordinate Judge held that the endorsement operated as a certificate of sale, and, with reference to s. 17 of the Registration Act of 1871, should have been registered, and dismissed the suit. On appeal by the plaintiffs the District Judge also held that the endorsement operated as a certificate of sale and should have been registered, and dismissed the appeal.

The plaintiffs appealed to the High Court.

Pandit Bishambhur Nath for the appellant.

Mr. Howard for the respondent.

The judgments of the Court, so far as they are material to the above contention, were as follows:

Spankie, J.—I have myself been a party to a ruling in this Court that an instrument of the nature of the endorsement on the deed of mortgage dated 26th September, 1866, would require registration, that is, I have held that a sale certificate in regard to immovable property of above Rs. 100 in value would require registration. The endorsement on the back of this deed of mortgage, which was sold at auction and purchased by the plaintiffs, is, I think, and operates as, a certificate of sale, and I cannot regard it as an order of Court, simply because it is signed by the Subordinate

Judge. The signature may authenticate the endorsement, but the endorsement itself is a certificate of sale, and a transaction that confers upon the purchasers the rights of the mortgagee and gives them an interest in immovable property exceeding Rs. 100 in value.

Oldfield, J.—I concur in the proposed order for dismissing the appeal with costs. The endorsement by which the deed of mortgage was assigned to the plaintiffs as purchasers of it at auction sale, is an instrument which required registration, and cannot be admitted in evidence.

Appeal dismissed.

PRIVY COUNCIL.

THE 18TH MARCH, 1879.

Present:

Sir James W. Colvile, Sir Montague E. Smith, and Sir Robert P. Collier.

[On appeal from the High Court of Judicature at Madras.]

KRISHNAMA(1) and others (*Plaintiffs*)

versus

KRISHNASAMI and others (*Defendants*).

Cause of action—Money interest—Performance of religious services.

A claim to certain pecuniary benefits and payments in kind which a plaintiff alleges himself to be entitled to receive from the defendants in respect of the performance of certain religious services, is a claim which the Courts of Justice are bound to entertain; and if, in order to determine the plaintiff's right to such benefits, it becomes necessary to determine incidentally the right to perform the services, the Courts must try and must decide that right.

THIS was an appeal brought under special leave from Her Majesty in Council, against a decretal order of the High Court of Judicature at Madras, dated the 16th February, 1877, confirming an order of the District Judge of Chingleput of the 21st December, 1876, whereby he rejected a plaint filed by the present appellants in a suit brought by them, on the ground that it disclosed no cause of action.

Mr. J. D. Mayne, for the appellants, contended that the plaint disclosed a sufficient cause of action, and that the Courts below were wrong in rejecting it. He referred to one previous litigation between parties substantially the same, in the case of *Narasimma*

(1) *Vide I. L. R., 2 Mad. 62.*

Cháryár v. Sri Krishna Tata Cháryár,⁽¹⁾ in which a similar suit was entertained. The same view had been taken in the case of *Archakam Srinivasa Dikshatulu v. Udayayagiri Anantha Chalu*,⁽²⁾ although in that case it was held that the claim made by the plaintiff was *res judicata*. See also *Kamalam v. Sodagopa Sami*⁽³⁾ in which *Chinna Ummayi v. Tegarai Chetli*⁽⁴⁾ was distinguished. The present case differed from that of *Striman Sadagopa v. Kristna Tata Cháryár*⁽⁵⁾ in so far as the plaintiff in that case was not officially connected with the temple in respect of which his claim was brought. In the Bombay cases, *Shankara bin Marabasapa v. Hanma bin Bhima*,⁽⁶⁾ and *Sangapa bin Basingapa v. Gangapa bin Nirajapa*,⁽⁷⁾ the claims were rejected as brought to vindicate the plaintiff's right to a mere dignity unconnected with any fees, profits or emoluments.

The respondents did not appear.

Sir Robert Collier :—This is an appeal from a judgment of the High Court of Judicature at Madras, rejecting a plaint under the 32nd section of the Code of Civil Procedure, as containing no cause of action, a proceeding equivalent to what in this country would be called judgment on demurrer. The only question before their Lordships is whether or not the plaint discloses any cause of action. Of course we have nothing to do with the question whether the cause of action, if any is stated, be well founded, or what may be the merits of the case. The declaration is by a large number of persons belonging to the *Tenkalai* sect, against other persons belonging to the *Vadakalai* sect. The substance of the plaint, which undoubtedly is not very clear, may be thus stated: It begins by declaring that the plaintiffs have the exclusive right to the *Adhyapaka mirass* of reciting certain religious texts, hymns, or chants in a certain pagoda and its dependencies, and deny the right of the defendants to recite them. Then comes an allegation which appears important: “The plaintiffs and the Brahmins of the plaintiff's *Tenkalai* sect have been for a long time past and up to this day discharging all the duties appertaining to the said *Adhyapaka mirass* right, and enjoying the incomes of the *Adhyapakam*, save those mentioned in Schedules B and C.” The plaint goes on to allege

(1) 6 Mad. H. C. Rep., 449.

(2) 4 Mad. H. C. Rep., 349.

(3) I. L. R., 1 Mad., 356.

(4) I. L. R., 1 Mad., 168.

(5) 1 Mad. H. C. Rep., 301.

(6) I. L. R., 2 Bom., 470.

(7) I. L. R., 2 Bom., 476

that the defendants, holding the office of *Dharmakartas* of the pagoda, in combination with other persons in rivalry with the plaintiffs, recited the *Vadakalai* invocations, chants, and other religious prayers, the exclusive right to recite which was incident to the plaintiffs' *Adhyapaka mirass*; that thereupon a complaint was preferred to the Magistrate and a report made, and for a time the defendants ceased to recite the chant and prayers in question, but that they again wrongfully recited them, and injured the exclusive right of the plaintiffs and others to recite them; but there is no allegation that the plaintiffs did not themselves perform or were prevented from performing these rites. On the contrary, the allegation is that they did perform them. S. 6 goes on to say, "The defendants having withheld the payment to the plaintiffs of some of the several incomes of the *Adhyapaka mirass* due to the plaintiffs in the said Devarája Swami's Pagoda, as well as in all the *Sannidhis* attached to it, the plaintiffs instituted suit No. 66 of 1865, on the file of the District Munsif's Court of Conjeveram, against the defendants, and this litigation went up as far as the High Court, and continued until March 1873, when a decision was passed in favor of the plaintiffs." The plaint further alleges (and this is the present cause of action): "The defendants have withheld the payment to the plaintiffs and the others of the *Tenkulai* sect of the amount of income mentioned in Schedule C for the six years from the date of the said suit No. 66 up to this day, to which the plaintiffs and the others of the *Tenkulai* sect are entitled, as also of the incomes which are mentioned in Schedule B, and which were being enjoyed by the plaintiffs and the others of the *Tenkulai* sect from the date of the said suit No. 66, until the final decree was passed by the High Court, save such as are now being enjoyed. They have also withheld from the plaintiffs and the others of the *Tenkulai* sect, the honors mentioned in Schedule A, from April 1873." There follows a prayer that the Court will pass a decree directing the defendants and others to abstain from reciting, and establishing the exclusive right of the plaintiffs, and also seeking to recover the value of various items stated in the schedules. Schedule C, which is to be found at the end of the schedules attached to the plaint, is in these terms: "Amount due for six years from October 1870 up to the current month, at the annual rate of Rs. 57-5-9, as mentioned in the decree in the original suit No. 66

of 1865, on the file of the District Munsif's Court of Conjeveram, Rs. 344-2-6." On reference to the record, this suit appears to have been brought by substantially the same plaintiffs (with some changes) against substantially the same defendants. The Munsif before whom the case was originally tried, affirmed the claim of the plaintiffs to the *Adhyapaka mirass*, and decreed that the sum of Rs. 57-5-9, as wages for the duty performed, should be paid to them by the defendants, these "wages" being in fact the money-value placed by the Court on certain payments in kind chiefly in the shape of food.

On appeal this decision of the Munsif was reversed by the District Judge, being the first Court of appeal, on the ground that no suit would lie in respect of the matter complained of. His decision was reversed by the High Court of Madras, who remanded the case, observing, "The claim is for a specific pecuniary benefit to which plaintiffs declare themselves entitled on condition of reciting certain hymns. There can exist no doubt that the right to such benefits is a question which the Courts are bound to entertain, and cannot cease to be such a question, because claimed on account of some service connected with religion. If to determine the right to such pecuniary benefit it becomes necessary to determine incidentally the right to perform certain religious services, we know of no principle which would exonerate the Court from considering and deciding the point."(1) In pursuance of this judgment, which appears to their Lordships to be perfectly correct, the cause was again tried by the Court of first appeal which somewhat increased the amount that the Munsif had given. The High Court upon further appeal affirmed the judgment of the Munsif, re-establishing the amount by way of annual payment at Rupees 57-5-9. It therefore appears that the plaintiffs in the present suit, having recovered in the former suit up to the date of the commencement of that suit the sum of Rupees 57 for certain services performed, are now seeking to recover the amount of wages that have accrued due to them for six years since the date of that suit at the same annual amount in respect of the same services which they allege themselves to have continued to perform, their performance not having been prevented, although possibly to a certain extent interfered with by the defendants. So much with respect to Schedule C.

(1) See 6 Mad. H. C. Rep., pp. 449, 451.

Schedule B relates to another class of payment as they are described in the schedule, in kind ; that is, in the shape of rice and other food which are described as due to the plaintiffs. The first item in the schedule is to this effect : "One Poli (circular cake made of wheat flour, Bengal gram, sugar, and ghee) due to *Adhyapakam* at the close of the *Tiruppavai*;" most of the other items are of the same character. Their Lordships do not understand these articles as consisting of mere presents made by the devout, but as certain payments in kind of the same nature as those comprised in Schedule C, which are now claimed by the plaintiffs from *Dharmakartas* of the temple which the defendants are, in respect of services performed. At the close, however, of this schedule, their Lordships observe a statement of an approximate sum claimed for presents made annually to the *Adhyapakas* by the adjoining villagers for the Tenkulai people. It may be that no action will lie for the recovery of this last item or in respect of the honors mentioned in Schedule A, and alleged to have been withheld from the plaintiffs; but that circumstance would not justify the rejection of the whole plaint, if it discloses a good cause of action in respect of Schedule C and the greater part of Schedule B.

The judgment of the High Court, now appealed against, which rejects this plaint, is in these terms : "We think the plaint was properly rejected under the 32nd section of the Code of Civil Procedure. The allegations respecting the 'Mirass of reciting prayers,' and the exclusive right of recital in a stated form and order, which the plaintiffs ask the Court to establish and to protect from infringement by the defendants, do not disclose a cause of action ; nor in our judgment does that portion of the plaint which alleges the withholding payment of certain specified sums which are described as 'the value of the incomes mentioned in Schedules B and C.' A reference to the schedules discloses nothing more than a list of cakes and offerings to which a money value is assigned. Reading the plaint and schedules together they express no more than this, that presents and offerings usually given have been withheld. If, as now alleged, the plaintiffs intended to claim emoluments or legal dues of right receivable by them for services rendered, it is sufficient to say they have failed to do this."

Their Lordships are unable to concur in this judgment. For the reasons which have been stated, they take a different view of

the plaint and of the schedules which have been referred to. It appears to them that the schedules are not more than a mere list of cakes and offerings to which a money value is assigned, that they disclose a claim, whether well founded or ill founded, as of right to certain dues for services performed. Schedule C to an annual payment for wages which has been assessed in the previous suit, and adjudicated upon as due to them. Schedule B to certain other payments in kind, presumably capable of a money value, which had been made to them up to the judgment in the former suit, but which had been since withheld.

This being so, the action falls within the principle of the judgment by which the former suit⁽¹⁾ was remanded, and of other cases to which their Lordships' attention has been called. They are therefore of opinion that the judgment should be reversed, and the case remanded for the purpose of trial, and that the appellant is entitled to the costs of this appeal; and they will humbly advise Her Majesty to this effect.

Appellant's Agents: Messrs. Burton, Yeates and Hart.

MADRAS HIGH COURT.

THE 22ND JANUARY 1879.

Before Mr. Justice Innes and Mr. Justice Mutusámi Ayyar.

THE EMPRESS⁽²⁾ v. KHOGAYI (First Prisoner) Appellant.

Indian Penal Code, s. 300—Provocation necessary—Evidence as to the condition of mind of the offender, admissible.

The provocation contemplated by s. 300 of the Indian Penal Code should be of a character to deprive the offender of his self-control. In determining whether it was so, it is admissible to take into account the condition of mind in which the offender was at the time of the provocation.

THE appellant (first prisoner) was charged with the murder of one Saradi, and a second accused (Bude) was charged with abetment of the murder.

The two prisoners were in their field strengthening the bund. Tataya and another (shepherds) drove their flock of sheep past the field. Some of the sheep went over the bund, and the prisoners,

(1) See 6 Mad. H. C. Rep., 449, p. 451.

(2) I. L. R., 2 Mad. 122.

annoyed at their bunt being damaged, abused and struck the shepherds. At this time Tataya's father (the deceased) and another came up. Deceased caught hold of his son, asking why the prisoners were beating him and abused them. First prisoner then struck deceased one blow on the side of the head with a heavy stick that was in his hands, and killed him.

The Sessions Judge convicted the first prisoner (appellant) of murder, and sentenced him to be transported for life. The second prisoner was acquitted.

On appeal by the first prisoner, Counsel not appearing for him, having heard the *Government Pleader* in support of the conviction, the High Court (Innes, J., and Muttusami Ayyar, J.) delivered the following

Judgment :—It was argued by the Government Pleader, who appeared in support of the conviction, that in determining what was the provocation which induced the act of the prisoner, all that took place before deceased arrived on the scene must be left out of account, because there is nothing to show that he had any part in the trespass and assault and other aggravating conduct of his son. Assuming it to be the law that the provocation which is contemplated by s. 300 must have proceeded from the person whose death is the subject of the inquiry either by his own acts or by acts of others which he instigated or otherwise abetted, and confining the provocation in this case therefore to the abusive language used by the deceased, we still think that it was grave enough and sudden enough to bring it within the character of that contemplated by the section.

What is required is, that it should be of a character to deprive the offender of his self-control. In determining whether it was so, it is admissible to take into account the condition of mind in which the offender was at the time of the provocation. In the present case the abusive language used was of the foulest kind, and was addressed to a man already justly enraged by the conduct of deceased's son. In the circumstances, we think the provocation was sufficient to deprive him of his self-control, and shall set aside the conviction of murder and substitute a conviction of culpable homicide not amounting to murder, and sentence the prisoner to seven years' rigorous imprisonment.

201. Where a person is charged, under s. 211 of the Penal Code, with having, with intent to injure, falsely charged another with an offence, knowing that there is no just and lawful ground for the same, the party accused should be allowed to show the information on which he acted; and the Judge ought not only to be satisfied that the facts alleged as the ground for making the charge, are in themselves untrue and insufficient, but also that they were known to be such to the accused when the charge was made by him. *Reg. v. Navalmal valad Umedmal.* 3. Bom. H. C H., 16.

202. False charge under s. 211, Penal Code, and false evidence under s. 193 are not cognate offences, nor parts of the same offence, but may be punished separately.—7 W. R., Cr., 59.

203. What is not a sufficient ground for a false charge under s. 211, Penal Code.—6 W. R., Cr., 15.

204. Where a man burns his own house and charges another with doing so, he should be convicted under s. 211, not s. 195.—8 W. R., Cr., 65:

205. Distinction between ss. 182 and 211.—8 W. R., Cr., 67; 16 W. R., Cr., 1.

206. S. 211 applies not only to a private individual, but also to a Police Officer who brings a false charge of an offence with intent to injure.—11 W. R., Cr., 2.

207. In a case of false charge, the Magistrate gave the accused (A) permission under s. 169, Act XXV of 1861, to prosecute the complainant (B) for an offence under s. 211, Penal Code. The Magistrate tried A's complaint as one under s. 211, but he subsequently proved a charge against B under s. 182, Penal Code, and punished him under that section. *Held*, with reference to s. 168, Act XXV of 1861, that the Magistrate was wrong in framing the charge under s. 182 without the previous sanction of the Criminal Court which heard the previous complaint of B.—13 W. R., Cr., 67.

208. Where a charge of theft was reported by the Police to be false,—*held*, that the Magistrate ought to have enquired into the charge of theft and passed some orders upon it, before proceeding under s. 211, Penal Code, to enquire into the offence of false charge.—16 W. R., Cr., 77.

209. What was held to constitute false charge under s. 211, Penal Code.—19 W. R., Cr., 5.

210. A Deputy Magistrate was held to have acted irregularly in dismissing a complaint and directing the trial of the complainant under s. 211, Penal Code, without recording his reasons for doing so, and without examining all the witnesses tendered by the complainant, or allowing a reasonable time for the attendance of such of the witnesses as were not present.—13 W. R., Cr., 37. See also 16 W. R., Cr., 44.

S. 213.

211. A Deputy Magistrate vested with the powers of a Subordinate Magistrate of the second class is not competent to initiate a charge under s. 213, Penal Code.—6 W. R., Cr., 90.

S. 214.

212. A contract compounding a charge of wrongful restraint, not allowed to be withdrawn by the Magistrate who punished [the accused criminally, is not illegal and may be sued on with reference to the exception to s. 214, Penal Code.—7 W. R., 33.

213. The offence of voluntarily causing hurt, under s. 323 of the Indian Penal Code, is one which may lawfully be compounded, and the withdrawal from the prosecution in such a case is, therefore, permissible under s. 188 of the Code of Criminal Procedure. *Reg. v. Jetha Bhala.* 10 Bom. H. C. R. 68.

214. Whenever the words “*voluntarily*,” “*intentionally*,” and “*fraudulently*,” “*dishonestly*” or others, whose definitions involve a particular intention, enter along with a specified act into the description of an offence, the offence not being one irrespective of the intention, is not one which the exception to s. 214 of the Indian Penal Code by itself allows to be compounded. The offence, to admit compromise, must be one in this sense irrespective of the intention, and it must be one for which a civil action may be brought at the option of the person injured, instead of criminal proceedings. In *Shama Churn Bose v. Bhola Nath Dutt* (VI Cal. W. R., 9) it was held by Peacock, C. J., and Jackson, J., that there is no law in the Mofussil which requires an injured person in any case to institute criminal proceedings before bringing his action. *Semble*, that there is in the Presidency towns (*Coona Mul v. Samo Rawe* 2 Mad. Jur. N. S. 187, as to the law in England. See *Well v. Abrahams*, L. Rep., 7 Q. B. 554, and *Osborne v. Gilbert* L. R., 85).

The offence of voluntarily causing grievous hurt cannot accordingly be compounded. *Regina v. Jetha Bhala* (10 Bom. H. C. Rep., 68) disapproved.

Note.—In conformity with this ruling, the following offences were held not compoundable :—

- (a) Criminal breach of trust, *Regina v. Lakshman Shenav Gabaji*, 24th February 1876.
- (b) Cheating—*Regina v. Lakhu Sadashiv*, 24th February 1876.
- (c) Defamation—*Regina v. Nutty*, 8th March 1876.
- (d) Enticing away a woman. *Regina v. Jetha Bhatnu*, 30th March 1876.

In addition to the authorities cited in the present case, *Regina v. Madan Mohan* (VI N. W. P. H. C. Rep. 302) may be referred to, in which it was held that the offence of voluntarily causing grievous hurt was not compoundable. See also the ruling 7 Mad. H. C. Rep. 34 in which it is laid down that dishonest misappropriation of property is not compoundable. *Regina v. Rahmat I. L. R.* 1 Bom. 147.

215. The offence of assaulting a man and intentionally causing grievous hurt does not consist of an act irrespective of the intention and cannot be compounded. The “assault” used in illustration(b) to s. 214 of Act XLV of 1860 does not mean assault as defined in the Code. It is to be construed in the general and more ordinary sense. *Queen v. Madan Mohan*. 6 N.W. P., 302.

216. The offence of kidnapping can be compounded under s. 214, Penal Code. 22 W. R. Cr., 26.

S. 217.

217. Where a village accountant, and a village Munsiff's peon had been convicted under s. 217 of the Indian Penal Code of having disobeyed the direction of law contained in s. 90 of the Criminal Procedure Code,

Held, that they were wrongfully convicted as not bearing the character which raises the obligation under the latter section.

The direction of law mentioned in s. 217, Indian Penal Code, means positive direction of law such as those contained in ss. 89 and 90 of Criminal Procedure Code, and cannot be made to extend to the more general obligation on every subject not to stifle a criminal charge. *In the matter of Raminibi Nayar*. I. L. R., 1 Mad. 266.

218. The accused was charged under s. 217 of the Indian Penal Code, but the charge did not distinctly state what the direction of the law was which he disobeyed, and how he disobeyed it.

Held, that where the accused has been convicted on a charge expressed in vague terms, the prosecution on appeal should be limited to the particular sense in which the charge has been understood at the trial.—*Imperatrix v. Baban Khan*. I. L. R., 2 Bom., 142.

S. 218.

219. It is sufficient for the purpose of a conviction under s. 217 of the Penal Code, that the accused has knowingly disobeyed any direction of the law as to the way in which he is to conduct himself as a public servant, and that he has done this with the intention of saving a person from legal punishment. It is not necessary to show that in point of fact the person so intended to be saved had committed an offence or was justly liable to legal punishment. The *Empress v. Amirud-Deen*. I. L. R., 3 Calc., 412.

220. A Kulkarni who makes a false report with reference to an offence committed in his village with intent, &c., is punishable under s. 218 of the Indian Penal Code. *Reg. v. Maihar Ramchandra*. 7 Bom. H. C. R., 64.

221. A police officer negligently or improperly submitting an incorrect report of a local investigation, may be punished under s. 29, Act V of 1861, where the proof is insufficient to bring the case under s. 218, Penal Code.—15 W. R., Cr., 17.

222. A conviction under s. 218, Penal Code, was quashed, because the intention with which the prisoner was charged, viz., to cause loss or injury to the Sub-Inspector, was held to be too remote to fall within the section. 19 W. R., Cr., 40.

S. 220.

223. Proof of an unlawful commitment to confinement, will not of itself warrant the legal inference of motive. Knowledge that such commitment is contrary to law is a question of fact and not of law, and must be proved in order to satisfy the requirements of s. 220 of the Indian Penal Code. *Reg. v. Narayan Babaji* and others. 9 Bom. H. C. R., 346.

S. 223.

224. A convict warder is a public servant under s. 223, Penal Code.—7 W. R., Cr., 99.

S. 224.

225. The punishment for escape from lawful custody under s. 224, Penal Code, in a case in which that is one of the offences of which the prisoner is convicted, must be in addition to any punishment awarded for the substantive offence.—8 W. R., Cr., 85.

226. The separate commitment upon a charge under s. 224 of escape from lawful custody whilst under trial before the Sessions Court, was cancelled, the offence being one cognizable by the Magistrate.—17 W. R., Cr., 14.

227. A person who is detained in custody for the purpose of giving security for good behaviour, and escapes from that custody, has not committed an offence under s. 224. 7 Mad. H. C. R., 41.

228. Where a person apprehended on a charge of a cognizable offence escapes from lawful custody, his liability to punishment is not affected by the circumstance that a competent Court determines his offence to be other than that with which he has been charged. But if charged with a non-cognizable offence, the police officer who apprehends him without a warrant does not have him in lawful custody, and his escape is not punishable under s. 224, Penal Code.—24 W. R., Cr., 45.

S. 225.

229. A person rescuing a prisoner apprehended by a Police Officer as a member of an unlawful assembly, is guilty of an offence under s. 225, Penal Code.—13 W. R., Cr., 75.

S. 226.

230. To constitute the offence described in this section, it is essential that the prisoner should have been actually sent to a penal settlement and have escaped before his term of transportation expired. 4 Mad. H. C. R., 152.

S. 228.

231. Prevarication by a witness may, though it does not necessarily, amount to contempt of Court within the meaning of s. 228 of the Indian Penal Code and s. 435 of the Code of Criminal Procedure. *Reg. v. Jaimal Shearan.* 10 Bom. H. C. R., 69.

232. Held that refusing or neglecting to return direct answers to questions does not constitute the offence under s. 228 of the Indian Penal Code, of intentionally offering insult or causing interruption to a public servant sitting in a judicial proceeding. *Reg. v. Pandu bin Vihoji.* 4 Bom. H. C. R., 7.

233. *Held*, that prevarication while giving evidence does not constitute the offence, under s. 228 of the Indian Penal Code, of intentionally causing interruption to a public servant sitting in a judicial proceeding. *Reg. v. Amba bin Bhivrao*. 4 Bom. H. C. R., 6.

234. A party who bids for an estate at a sale in execution with knowledge that he is not in a position to deposit the earnest-money, obstructs the business of the Court, and is guilty of contempt of Court, punishable under s. 228, Penal Code. W. R., Sp., Mis., 3.

235. The Court before which a contempt of Court under s. 179, Penal Code, is committed should not deal with the offence itself, but should, under s. 163, Act XXV of 1861, after recording a statement of the facts constituting the contempt of Court and the statement of the accused person, forward the case to a Magistrate.—11 W. R., Cr., 49.

236. In a conviction under s. 228, Penal Code, it ought to be stated that the Judge was sitting in a (and what) stage of a judicial proceeding.—12 W. R., Cr., 64.

237. A Magistrate was held to have no jurisdiction in a case of contempt of Court committed before a Sub-Registrar who did not proceed under s. 435 or 436, Act X of 1872; the Sub-Registrar being a public officer under Act VIII of 1871, his proceedings being judicial proceedings within the meaning of s. 228, Penal Code, and his Court a Court as defined in Act I of 1872.—22 W. R., Cr., 10.

238. A witness is not guilty of an offence under s. 228, Penal Code, giving inconsistent evidence and giving evidence reluctantly and taking up the time of the Court.—15 W. R., Cr., 5.

S. 230.

239. It is not necessary, to satisfy the ordinary definition of money, that a *coin* should be a legal tender receivable at a value in rupees fixed by law. Gold mohurs which, although they do not pass at an absolutely fixed value, yet have a current value, not ascertainable merely by weighing them as lumps of gold, but attaching to them as coin, and coins "for the time being used as money," within the meaning of Act XIX of 1872. *Queen v. Kunj Behari*. 5 N. W. P., 187.

S. 231.

240. The test of whether a coin is money or not, is the possibility of taking it into the market and obtaining goods of any

kind in exchange for it. For this its value must be ascertained and notorious.

Held, therefore, that to counterfeit a coin of the Emperor Akbar's time (which is no longer current) was not an offence under s. 230 and 231 of the Indian Penal Code. *Reg. v. Bapu Yadav and Rama Tulshiram.* 11 Bom. H. C. R., 172.

S. 239.

241. S. 239 of the Indian Penal Code is directed against a person other than the coiner who procures, or obtains, or receives counterfeit coin, and not to the offence committed by the coiner. *Queen v. Sheo Bux alias Sheo Parshad.* III N.-W. P. 150.

S. 241.

242. The gist of an offence under s. 241, Indian Penal Code (passing as genuine coin known to be counterfeit), is that, a person should deliver or attempt to induce any other person to receive as "genuine," coin known to be counterfeit. *Queen v. Sooruth.* 4 N. W. P., 62.

S. 242.

243. The Court inclined to hold that a cattle-yard which was originally walled on four sides, and in one side of which, fallen out of repairs, there was a gap stopped with a thorn, was a building used as a place for the custody of property, within the meaning of s. 242 of the Indian Penal Code. *Queen v. Dallu.* 6 N. W. P., 307.

S. 266.

244. The mere possession of weights in excess of the authorised standard will not support a conviction under s. 266 of the Indian Penal Code; a fraudulent intent must be charged and proved. *Reg. v. Damodhur Dalji.* 1 Bom. H. C. R., 181.

S. 268.

245. A common gaming house is one which is kept or used for profit or gain, and may constitute a public nuisance; but it cannot be held, in the absence of evidence of any actual annoyance to the public, that every person who admits gamblers into his house, and all persons who game therein, are guilty of public nuisance within the meaning of s. 268 of this Code. *Reg. v. Hana Nagji et. al.* 7 Bom. H. C. R., 74.

S. 277.

246. The words "public spring or reservoir" used in s. 277 of the Indian Penal Code do not include a public river. The strewing of branches in a river for fishing purpose, held, therefore, to

be no offence under that section. The *Empress v. Holodhar Poropā*.—I. L. R., 2 Cal. 383.

S. 279.

247. The actual driver, and not the owner of the carriage, is liable under s. 279, Penal Code, for rash driving.—14 W. R., Cr., 32.

S. 282.

248. Boatmen who ply an unseaworthy vessel, whereby the lives of passengers for hire are endangered, should be charged under s. 282 and not under s. 336 of the Indian Penal Code. *Reg. v. Khoda Jagta et. al.* 1 Bom. H. C. R. 137.

S. 283.

249. The owners of cattle which are driven along a public road cannot be convicted under this section when they were not personally present. 8 Mad. H. C. R., 9.

250. The unauthorised repairing of a public road is not an obstruction under s. 283, Penal Code.—7 W. R., Cr., 31.

S. 285.

251. Held that the word "injury" (rashly caused by fire, &c.) in s. 285 of the Indian Penal Code includes any harm illegally caused to the property of any other person, and is not confined to injury to the person only. *Reg. v. Natha Laila.* 5 Bom. H. C. R., 67.

S. 289.

252. To sustain a charge under s. 289 of the Indian Penal Code, there should be evidence not only of negligence but also that such negligence would probably lead to danger to human life or of grievous hurt. 3 Mad. H. C. R. 33.

253. A pony is an animal within the provision of s. 289, Penal Code. 19 W. R., Cr., 1.

S. 290.

254. The sentence of imprisonment passed in default of the payment of a fine inflicted under s. 290 of the Indian Penal Code (for committing a public nuisance) should be one of simple, not rigorous, imprisonment. 5 Bom. H. C. R. 45.

255. The omission to keep one's ponies or buffaloes from straying is not a public nuisance under s. 290, Penal Code.—6 W. R., Cr., 71; 9 W. R., Cr., 70.

S. 294.

256. Merely singing *lavaniyas* does not amount to any offence under this section. 4 Bom. H. C. R. 25.

93. A man, by the attachment of his organs to sensual pleasure, incurs certain guilt: but, having wholly subdued them, he thence attains heavenly bliss.

94. Desire is never satisfied with the enjoyment of desired objects; as the fire is not appeased with clarified butter; it only blazes more vehemently.

95. Whatever man may obtain all those gratifications, or whatever man may resign them completely, the resignation of all pleasures is far better than the attainment of them.

96. The organs being strongly attached to sensual delights cannot so effectually be restrained by avoiding incentives to pleasure as by a constant pursuit of divine knowledge.

97. To a man contaminated by sensuality, neither the *Védas*, nor liberality, nor sacrifices, nor strict observances, nor pious austerities, ever procure felicity.

98. He must be considered as really triumphant over his organs, who, on hearing and touching, on seeing and tasting and smelling, *what may please or offend the senses*, neither greatly rejoices nor greatly repines:

99. But, when one among all his organs fails, by that single failure his knowledge of GOD passes away, as water flows through one hole in a leathern bottle.(1)

100. Having kept all his members of *sense and action* under control, and obtained also command over his heart, he will enjoy every advantage, even though he reduce not his body by religious austerities.

101. At the morning twilight let him stand repeating the *gáyatrí* until he see the sun; and at evening twilight, let him repeat it sitting, until the stars distinctly appear;

102. He who stands repeating it at the morning twilight, removes *all unknown* nocturnal sin; and he who repeats it sitting at evening twilight, disperses the taint, that has *unknowingly* been contracted in the day; —

(1) "As water flows through one hole of a bottle." The original is more expressive, and alludes to the custom of carrying water in goat-skins in India. The skin is sewed together again, just as taken off the animal, and one of the feet is left open for the purpose of filling and emptying the skin, which is carried on a man's back; the foot for use being firmly grasped by the hand of the carrier, who thus distributes the water at his pleasure. Hence the passage would be more exactly rendered "as water from one foot of a skin."

103. But he who stands not repeating it in the morning, and sits not repeating it in the evening, must be precluded, like a *Súdra*, from every sacred observance of the twice born classes.

104. Near pure water, with his organs holden under control, and retiring from circumspection to some unfrequented place, let him pronounce the *gáyatrī*, performing daily ceremonies.

105. In reading the *Véddángas*, or *grammar*, *prosody*, *mathematics*, and so forth, or even such parts on the *Véda* as ought constantly to be read, there is no prohibition on particular days; nor in pronouncing the texts appointed for oblations to fire:

106. Of that, which must constantly be read, and is therefore called *Brahmasatra*, there can be no such prohibition; and the oblation to fire, according to the *Véda*, produces good fruit, though accompanied with the text *vashat*, which on other occasions must be intermitted on certain days.

107. For him, who shall persist a whole year in reading the *Véda*, his organs being kept in subjection, and his body pure, there will always rise good fruit from his offerings of milk and curds, of clarified butter and honey.

108. Let the twice born youth, who has been girt with the sacrificial cord, collect wood for the holy fire, beg food of his relations, sleep on a low bed, and perform such offices as may please his preceptor, until his return to the house of his natural father.

109. Ten persons may legally be instructed in the *Véda*: the son of a spiritual teacher; a boy who is assiduous; one who can impart other knowledge; one who is just; one who is pure; one who is friendly; one who is powerful; one who can bestow wealth; one who is honest; and one who is related by blood.

110. Let not a sensible teacher tell any other what he is not asked, nor what he is asked improperly; but let him, however intelligent, act in the multitude as if he were dumb:

111. Of the two persons, him, who illegally asks, and him, who illegally answers, one will die, or incur odium.

112. Where virtue, and wealth sufficient to secure it, are not found, or diligent attention, at least proportioned to the holiness of the subject, in that soil divine instruction must not be sown: it would perish like fine seed in barren land.

of the great chapters of a Code.

30. The inference from such considerations as well as from the general practice of mankind is, that neither the purely abstract principles involved in laws, nor their historical relations, however necessary a study of these may be for their full comprehension, and for their scientific reconstruction, afford a safe or convenient basis for their arrangement. The great necessary relations in society which the laws do not create, but only regulate, are those which, combining the largest collections of naturally connected doctrines, suggest the best working plan. The State, moreover, does not and cannot as such come forward in its law-making capacity until society is already formed and tolerably well advanced in a rudimentary civilization. Its very existence as a political power presupposes a community already by common consent submitting in many things to fixed laws. What the sovereign-power, wherever it resides, has under these circumstances to do is, first, to provide for its own continued existence, and next for that of the society, by checking the disruptive force of private violence. The acquisition and devolution of property must already have become subject to customary rules before law in the strictest sense becomes possible. The governing ideas are modified and defined rather than created by legislation. The family in some form must have been coeval with, if not prior to, distinct personal ownership. In its essence it involves a set of relations but very partially amenable to external coercive regulation, but its continuity of existence brings it into connexions with property which at first are recognized and then regulated.

31. In all these cases the State has to deal with relations conforming to regular types of a permanent or at least durable existence, and susceptible of strict regulation. In the great field of personal obligations the power of legislation as bearing on the essentials is comparatively limited. The natural instinct of freedom asserts itself in making bargains, and there is no interest of the community in general to be served by checking its indulgence. The law here is concerned rather in facilitating than in controlling the action of individuals. But if one fails in the duty he has undertaken to another, the State intervenes, and by force compels him to perform this duty, as it would one directly imposed in the public interest, or else to render an equivalent. The intervention

must, however, be called for. No interest of the community is so directly touched that the State should voluntarily step in to repress a breach of contract. Nor is it concerned, without invitation, to enforce redress for the large class of wrongs, ranging from inappreciably petty injuries at one end of the scale up to offences at the other. The public is but remotely interested in the contentions that arise from this source, in which, too, as in cases of contract, the right or wrong is seldom all on one side. The general characteristic of both classes of obligations is that they can be satisfied by a money-payment,—liquidated or unliquidated damages,—if not, then by some stipulated or compensatory act enforceable in a like way, from whichever source the obligation has sprung. Here the connecting link which associates cases otherwise very diverse is the substantial identity of the remedies, as in family-law it is the identity of physical and moral relations, and in the law of property the identical nature of the material objects of men's rights and duties.

32. The law of personal capacity lies rather collateral to, than in any relation of logical antecedence or sequence to, the other great branches of the law. We may regard the impersonated State as either addressing its commands only to persons of particular conditions, as alone conceived able to obey them, or to the whole body of citizens, with following clauses of exception in favour of those deemed incapable of performing the duties imposed on each man in general. In a Code recognizing caste or other distinctions of race or birth as stamping an immutable legal character on every subject from the first, the law of status in this sense, and the legislation determining it, might properly take precedence of other private laws. It would define certain dominant capacities by which the whole operation of the laws of property, family, and obligations would be pervaded and modified at every step. But in a system accepting as a principle the possibility of indefinite changes of personal condition a different set of considerations prevail. We are not met at every turn by an enlarged capacity attending a high caste or a *deminutio capititis* caused by a low caste: capacity for rights and duties presents itself as generally uniform, subject only to particular exceptions requiring special discussion. Thus, physical imbecility due to age or sex, mental, as in the case of lunacy, and disabilities arising from a foreign

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THE
LEGAL COMPANION.

FEBRUARY, 1881.

We beg to acknowledge with thanks the receipt, from Mr. D. E. Cranenburgh, of the first part of his "Unrepealed General Acts of the Governor-General in Council." It contains the unrepealed Acts of the years 1834 to 1860, with important notes. Among the contents, we notice the Penal Code, the Police Act, the Whipping Act, the Succession Act, the Minor's Act, the Copy-Right Act, the Certificate Act, &c. This part contains 540 pages, and was punctually issued within the first week of February, as promised. We have been told that the other parts will come out as regularly as the first one. We think no legal practitioner should miss this opportunity of availing himself of a complete set of these Unrepealed Acts by paying Rs. 4-8 monthly, for a period of six months only. We need not add that the publication is an exceedingly cheap and useful one.

OF all the commentaries on the Specific Relief Act, the one lately published by Mr. Venkatrao Ram Chandra is decidedly the best. Although the Act itself does not extend over more than 24 pages, the notes are so numerous that the above work contains upwards of 650 pages. It seems that everything that long experience and untiring care could do to make the work perfect of its kind has been done. We have no hesitation to recommend it to our readers as a very valuable work of reference. The price of each copy is Rs. 10-8 only; and the books may be had from the Manager, Serampore Book Depôt. In support of our remarks we make the following extract at random :—

(i) *The effect of dismissing a suit for specific performance.*

29. The dismissal of a suit for specific performance of a con-

tract or part thereof shall bar the plaintiff's right to sue for compensation for the

breach of such contract or part, as the case may be.

In England it has hitherto been the practice in Equity to restrain an action at Law which was inconsistent with a prior decree between the parties in a suit for specific performance. (q); an action by a vendor whose bill for specific performance has been dismissed for want of title (r) : but, in general, the dismissal of the vendor's bill has not interfered with his right to bring an action : nor has it been considered necessary, although not unusual, to state in the decree that the dismissal was without prejudice to the legal right. (s)

But the present section is a departure from the rule of English law. Here, in India, the Courts are both Courts of Law and Equity, and consequently all remedies on a contract can be exhausted in one and the same Court, and, therefore, the intention of the Legislature is that only one suit should be brought for the non-performance of a contract. Under s. 7 of the former Civil Procedure Code (Act VIII of 1859), which was in force at the time when the Specific Relief Act was passed, every suit must include the *whole* of the claim arising out of the cause of action, and if a plaintiff relinquished or omitted to sue for any portion of his claim, a suit would not lie for the portion so relinquished or omitted. The corresponding provisions of the new Civil Procedure Code are very much the same, and are contained in ss. 42 and 43 of Act X of 1877. If the cause of action consist of a claim for specific performance of a contract and for damages for the breach of it, a plaintiff must, under the Civil Procedure Code, sue for both; and if he omit or intentionally relinquish to sue for either, he cannot afterwards sue for the other, unless he has obtained the leave of the Court before the first hearing.

If a suit for the specific performance of a contract was decided previously, and if that decision bar a plaintiff's right to sue for compensation for the breach of such contract on the ground of *res judicata* under s. 13 of Act X of 1877, then it is evident that the section *sub-judice* has no operation in such cases.

The present section must, therefore, be applied to cases where separate actions can be brought under the Civil Procedure Code for specific performance of a contract or part thereof, and for damages for the breach of such contract or part; and in such cases the dismissal of a suit for specific performance bars a suit for damages. Again, the dismissal of a suit for the specific performance of a part of a divisible contract will bar a suit for damages for the breach of such part only, but will not bar a suit for the specific performance of any other part of it, or for damages for the breach of such other part. As for divisible contracts, see *ante*, s. 16, and the notes thereunder.

As regards the construction of this section one might argue that the nature of dismissal is not mentioned in this section, nor is the term explained anywhere in the Act; that a suit may be dismissed under any of the ss. 97, 98, 102, 107, 136, 157, 370, and 455, of the Civil Procedure Code (Act X of 1877); and that consequently it might seem that whether a suit for the specific performance of a contract or part thereof be dismissed on the merits of a case or otherwise, yet the plaintiff would lose his right to sue for compensation for the breach of such contract or part. But evidently this could not have been the intention of the legislature.

Indian Decision.

As in a former suit brought by the present defendant for specific performance of the same contract, plaintiff (who was defendant there) had resisted successfully and without qualification, he could not afterwards treat the contract as subsisting.—*Sheo Pergah Ray and another v. Injore Tewarce*, 21 C. W. R., C.R., 483, *per* Phear and Morris, JJ.

(q) *Reynolds v. Nelson*, 6 Madd. 290.

(r) *M' Namara v. Arithur*, 2 Ba. & B. 353.

(s) Sugden's V. and P 14th Ed. 235 *et seq.*, Dart's V. and P., 5th Ed., 972 and 1123; See *Wedwood v. Adams*, 8 Beav. 105.

N.-W. P. HIGH COURT.

THE 17TH NOVEMBER 1879.

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.*BHUPAL(1) (*Defendant*)

versus

JAG RAM (*Plaintiff*).*Condition against alienation—Mortgage.*

Held that where a person stipulates generally not to alienate his property, he does not thereby create a charge on any particular property belonging to him(2).

THE following judgments were delivered by the Court :—

Stuart, C. J.—In this case one Jawahir, in the course of execution of a Small Cause Court decree against him at the suit of the plaintiff, had, by a petition in the execution department dated the 19th December 1871, agreed to pay the debt by yearly instalments, and the petition then proceeds as follows : “ In case of default I shall pay the amount of both the decrees in a lump sum : I shall not alienate my own property and that of my father until the amount of both the decrees has been paid : if I do so, I shall first pay the amount of the decrees : the first instalment shall fall due in the month of Baisakh, Samhat 1929.” It is contended that this has the effect of constituting a valid *lien* by hypothecation in favour of the plaintiff, and that therefore a subsequent sale to Bhupal, the defendant, was invalid. But such a contention cannot be allowed. The agreement contained in the petition is not evidence of any hypothecation, not even of a verbal one, but simply an arrangement that the property should not be alienated till the debt was paid. In fact, such an agreement goes to disprove that any mortgage or hypothecation was made, or even intended by it, for the very fact of an undertaking “ not to alienate” shows that neither the property itself nor any interest in it had actually passed to the plaintiff, which, if there had been a good and valid hypothecation, must have occurred. The sale, therefore, to the defendant, appellant, cannot be impugned. The present appeal must be allowed, the decrees of both the lower Courts are reversed, and the suit dismissed with costs in all the Courts.

(1) *Vide* I. L. R., 2 Alla., 449.

(2) For other cases in which it was held that a mere covenant not to alienate does not amount to a mortgage, see *Guru Singh v. Latifat Hussain*, I. L. R., 3 Calc., 336 ; *Ram Baksh v. Soorah Deo*, H. C. R., N.-W. P., 1869, p. 65 ; *Chonnu Lall v. Pahulwan Singh*, H. C. R., N.-W. P., 1868, p. 270.

CALCUTTA HIGH COURT.

FULL BENCH.

THE 6TH SEPTEMBER 1880.

Present :

The Hon'ble Sir Richard Garth, Kt., Chief Justice, and the Hon'ble C. Pontifex, G. G. Morris, R. C. Mitter, and H. T. Prinsep, Judges.

Limitation—Suit for arrears of rent—Act VIII of 1869 (B. C.), s. 29.

KASHI KANT BHUTTACHARJI, *Defendant, Appellant,*
versus

ROHINI KANT BHUTTACHARJI, *Plaintiff, Respondent.*

The last day on which a suit for the recovery of arrears of rent can be instituted under s. 29 of Act VIII of 1869 (B. C.) is the last day of the third year from the close of the year in which the rent became payable. Held also that the word "*arrear*" in s. 29 means "*rent in arrear*," and that rent in arrear becomes due on the last day of the year in which it is payable, that is, at the last moment of the time which is allowed to the tenant for payment.

THE case was referred to the Full Bench by Morris and Prinsep, J. J., with the following remarks :—

Reference.—We are called upon to decide in this second appeal whether a suit for arrears of rent of 1280, or of any portion of it, brought on the 30th Assar 1284, (corresponding with July 13th, 1877) is not barred by limitation under the terms of section 29 of the Bengal Rent Law, Act VIII (B. C.) of 1869.

The plaintiff respondent's pleader relying on the judgment of a Division Bench of this Court in the case of *Womesh Chunder Bose v. Surju Kunto Roy Chowdhary*, 6 Cal. L. R. 49, at first contended that the present suit, so far as it relates to rent of 1280, could be brought at any time within 1281. But on its being pointed out that in this case the defendant was under a contract to pay the rent by instalments in the months of Assar, Assin, Pous, and Cheyt, he admitted that this judgment did not support him so far as this suit related to the rent payable in three first named months, but he argues that it is strictly applicable in respect of the rent payable in Cheyt.

On reference to the judgment in question it appears to us to be undoubtedly an authority for the proposition that a suit for the rent

of Cheyt 1280 can be brought at any time before the close of 1284. But with all deference to the learned Judges who delivered that judgment, we cannot concur in the construction which they put upon the terms of s. 29 of the Rent Law.

It appears to us that following the construction placed both by the Courts in England, and by the Imperial Legislature, on terms similar to those used in s. 29 of Act VIII of 1869 of the Bengal Code, a suit for arrears for rent of the entire year 1280, or of the last instalment of that year, cannot be brought after three years, calculated from the last day of 1280.

We do not agree with the learned Judges who decided the case reported in 6 Cal. L. R., 49, that the rent of 1280 supposing it to be payable in one payment, would not be due until the first Bysack 1281. It would, in our opinion, be due or payable on the last day of 1280, that is, on the last day of Cheyt of that year. The correct rule for interpreting the terms used in s. 29 seems to us to be that which is contained in the Limitation Acts of 1877, and in clauses 2 and 3, s. 3, of the General Clauses Act (1 of 1868), viz., that in calculating limitation or determining a particular period, the first day of that period should be excluded, and the last day included. Moreover, it has been held by the Courts in England (see Maxwell on Statutes, p. 310) when "the particular period was one month, corresponding with that from which the computation began is excluded, so that two days of the same number are not comprised in it."

It is true that the Acts of the Imperial Legislature, to which we have referred, do not apply to the Bengal Rent Act, but there is nothing in that Rent Act which is opposed to such a construction, and in our opinion the general principles which regulate the interpretation of expressions similar to those contained in s. 29, should be applied also to that special law. There is nothing in the Rent Law which makes it exceptional in this respect.

In the present case therefore, we are of opinion that limitation commenced to run from the last day of Cheyt 1280, when the instalment payable on that date became due, but that in calculating the term of three years that day must be excluded. A suit for that instalment could not be brought until the 1st Bysack 1281, and might be brought not later than the last day of the period of three

years from the last day of Cheyt 1280, calculated according to the Gregorian Era.

This question, as affecting the period within which suits for arrears of rent may be instituted, is of great importance, and calls for immediate decision. We desire, therefore, the authoritative ruling of a Full Bench on the following point :—

What is the last day on which a suit, for the recovery of ordinary arrears of rent, that is, rent payable yearly at the close of the year to which it relates, can be instituted under section 29 of Act VIII (B. C.) of 1869 ?

The Full Bench delivered the following

JUDGMENT.—We think it clear that the last day on which a suit for the recovery of arrears of rent can be instituted under the section referred to, is the last day of the third year from the close of the year in which the rent became payable ; and as in this case the rent was payable in the month of Cheyt 1280, and the defendant was bound to pay it before the close of the last day of that month, the plaintiff must have brought his suit within three years from that day.

We do not quite understand the reasons upon which the case of *Womesh Chunder Bose v. Surju Kanto Roy*, 6 C. L. R., 49, proceeded. It seems to have been considered by the learned Judges in that case, that an arrear of rent does not become due until the day after that on which, by the terms of the holding, the rent is payable. But this, we think, is a fallacy. The rent becomes due at the last moment of the time which is allowed to the tenant for payment. If it is not paid within that time it becomes an arrear, and continues an arrear until it is paid.

The word “*arrear*” in section 29 of the Rent Act means “*rent in arrear*;” and that rent in arrear would undoubtedly become due on the last day of the year in which it is payable.

The judgment, therefore, of the lower Appellate Court will be modified, by limiting the sum which the plaintiffs are entitled to recover, to the rent which became due in the year 1281 and 1282.

We think that the appellant should only have his proportionate costs of the hearing before Mr. Justice Morris and Justice Prinsep, but that he is entitled to the full costs of this hearing.

CALCUTTA HIGH COURT.

THE 22ND JANUARY AND 9TH MARCH 1880.

*Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.*BEMOLA DASSEE(1) (*Plaintiff*)*versus*MOHIM DASSEE and others (*Defendants*).*Hindu Law—Joint Family.—Dayabhaga—Joint Family Business—Power of Managing Member to bind Members of Partnership.*

Adult members of an undivided Hindu family governed by the law of the Dayabhaga, who have an interest in a family business carried on by the managing member of the family, and who are maintained out of the profits of such business, must, in the absence of evidence, be taken to possess the knowledge, that the business might require financing, and to have consented to such financing. Where, therefore, a managing member of such a family, in carrying on the family business, obtains an advance necessary for the purposes of the business by pledging the joint family-property, the mortgage is binding on all the members of the partnership.

Garth, C. J. (Pontifex, J., concurring)—

The question we have to decide in this appeal is, whether two adult ladies, who are the widows of two members of an undivided Hindu family governed by the law of the Dayabhaga, are bound by a mortgage of joint family-property made by the surviving brother and managing member of the family, as to which they allege they were not consulted, and by the subsequent decree for sale in a suit by the mortgagee against the managing member as sole defendant.

The plaintiff, who is one of the two ladies above mentioned, the other of them being a defendant in the same interest with the plaintiff, by her plaint prays, that her rights in the mortgaged premises may be ascertained and declared; that it may be declared that her share is not affected by the mortgage; that the decree in the mortgage suit may be declared fraudulent and void as against her; that an account may be taken of the rents and profits, and her share ascertained and paid; and that the mortgaged property may be partitioned.

If the case turned on a question of joint family-property pure and simple, it would be doubtful whether, apart from consent,

(1) *Vide I. L. R., 5 Calc. 792.*

the plaintiff would be bound by a mortgage made by the managing member alone, or by a decree on the mortgage obtained against the managing member as sole defendant, even though the mortgage was made for a debt in respect of which she was liable jointly with the managing member.

It is certainly doubtful, under the law of the Mitakshara, where a member of a joint family before partition has no definite share, whether an adult would be bound by the mortgage or alienation for necessary purposes by the managing member of the family.—See *Sheo Bunshi Koer v. Sheo Prosad Singh*,⁽¹⁾ and if there is any difference in this respect between the law of the Mitakshara and the law of the Dayabhaga, it would seem to be still more doubtful under the latter. The question to be determined in this case, however, is not in our opinion a question of joint family-property pure and simple, for it is materially affected by other circumstances.

Ramlochun Soor was the father of Obhoy Churn, Sree Churn, and Gour Churn. During his lifetime Ramlochun carried on business in Calcutta in partnership with a third person, whom and whose representatives we shall hereafter refer to as the independent partner. During Ramlochun's life the properties to which this suit relates were purchased, and two of those properties were actually purchased in the names of Ramlochun and the independent partner. Ramlochun died more than fourteen years ago intestate, and his property and his share in the partnership business were inherited by his three sons, who conducted and managed the same. Obhoy Churn, the plaintiff's husband, died in 1868, intestate and without issue; and Sree Churn died in 1872, intestate and without issue, leaving a widow, who is a defendant to this suit in the same interest with the plaintiff. After the death of Obhoy Churn and Sree Churn, Gour Churn continued to manage the family share in the partnership and the joint family-property, and he and his brother's widows continued to live as an undivided family, the profits of the family share in the business being blended with the income of the joint family-property, and employed for the benefit and maintenance of the joint family, for we agree with the lower Court in altogether disbelieving the evidence adduced by the plaintiff, meagre as it is, as to her

(1) L. R., 6 I. A., 88, at p. 101.

withdrawing from the business, or altering her position with respect thereto. The business had for years been financed by the defendants. In 1874, the amount due to them was over Rs. 21,000. The business had pressing need of further advances, and application was made to the defendants, who agreed to make advances, but insisted upon having security for the Rs. 21,000, and for further advances up to Rs. 31,000 on the whole. In March 1874, Gour Churn and the independent partner executed a mortgage accordingly, which not only covered the joint family-property in respect of which this suit is instituted, but also property of the independent partner. Upon the execution of the mortgage a further advance was made.

In June 1876, there was a balance due on the mortgage of over Rs. 29,000. On the 8th June 1876, the mortgagees instituted a suit on the mortgage against Gour Churn and the independent partner, and on the 17th August, they obtained a decree, and under it one of the properties purchased by Ramlochun has been sold; but the purchaser has not been made a party to this suit.

The suit, in fact, except so far as it asks for partition, which we consider is asked for merely as a secondary relief, seeks only for a declaratory decree. It is apparent from the foregoing circumstances, therefore, that this is not simply a case in which Gour Churn mortgaged joint property as the managing member of the family. These ladies continued to be interested in the business; they must be taken to have known that it was financed by the defendants, and that it required advances; they allowed Gour Churn to stand forward as the ostensible owner of the family share; they participated in, and were maintained out of, its profits, and they were, in our opinion, certainly liable for the debts of the business. As authorised manager of the family share in the business, Gour Churn was clearly capable of making all necessary business contracts. Did it lie within his power as such manager to raise moneys necessary for the business (as to which there is no question) by mortgaging the joint family-property?

If the joint family-property can be considered as partnership property belonging to the family share of the business, we think there could be no doubt that he could pledge it. Mr. Justice Lindley, in his book upon partnership, states the English law, which in this respect is founded on reason and convenience, as follows :—

"The writer is not aware of any decision in which an equitable mortgage made by a partner by a deposit of deeds relating to partnership real estate has been upheld, or the contrary; he can therefore only venture to submit, that such a mortgage ought to be held valid in all cases in which it is made by a partner having an implied power to borrow on the credit of the firm." (Page 229, 1st edition.)

In this case Gour Churn certainly had an implied power to borrow on the credit of the joint family as partners in the firm; also, we think, he had power to borrow on the credit of the joint family as a joint family for the purposes of the firm. A joint family carrying on a business is necessarily a peculiar kind of partnership. It does not cease on death; but the shares in it are inheritable along with the shares in the joint family-property. We agree with the decision at page 51, Appendix 1, of the first volume of the Bombay High Court Reports (approved at page 471 of the first volume of Indian Law Reports, Calcutta Series). In that case the following propositions were stated as law (pages 71 and 72):—"The power of a manager to carry on a family trade necessarily implies a power to pledge the property and credit of the family for the ordinary purposes of that trade. Third parties, in the ordinary course of *bonâ fide* trade dealings, should not be held bound to investigate the status of the family represented by the manager whilst dealing with him on the credit of the family-property. Were such a power not implied, property in a family trade, which is recognized by Hindu law to be a valuable inheritance, would become practically valueless to the other members of an undivided family, wherever an infant was concerned, for no one would deal with a manager, if the minor were to be at liberty, on coming of age, to challenge, as against third parties, the trade transactions which took place during his minority. The general benefit of the undivided family is considered by Hindu law to be paramount to any individual interest, and the recognition of a trade as inheritable property renders it necessary for the general benefit of the family that the protection which the Hindu law generally extends to the interests of a minor should be so far entrenched upon as to bind him by acts of the family manager necessary for the carrying on and consequent preservation of that family-property; but that infringement is not to be carried beyond the actual necessity of the case."

In the present case the question of necessity or propriety does not arise. And we can see no difference in respect of the law as laid down between families governed by the law of the Mitakshara and the law of Dayabhaga. But it is objected that the Bombay case relates only to the power of the manager to bind infants, and that it is no authority for the proposition that he can also bind adults, and no doubt that is so. But, having regard to the observations in that case as to the peculiar nature of a joint family business, and the opinion expressed by Mr. Justice Lindley in his book, with which we also agree, we think that the manager had at least power, for the necessary purposes of the business, to make an equitable pledge of the joint family-property which would bind the plaintiff.

The circumstances of the case do not, in our opinion, render it necessary for us to express an opinion whether the plaintiff is bound by the decree in the suit to which she was not a party. The plaintiff is, in our opinion, distinctly liable for the debt, and bound by the pledges. She now sues without making any offer to pay off the debt. She is seeking the aid of equity without offering to do equity. If she had made such offer, she might perhaps have been entitled to have the decree re-opened and the accounts retaken, for the purpose of giving her an opportunity of redeeming. She is either bound by the decree in the mortgage suit or not. If she is bound, we cannot interfere. And if she is not bound, we ought not to interfere by making any declaration, except upon the condition of her offering to pay the debt for which she is liable.

As she has made no such offer, we must confirm the decree of the Court below, and dismiss the appeal with costs on scale No. 2.

We may add that we are the more inclined to arrive at this conclusion, because we think it a highly suspicious circumstance that the lady was not examined by commission or otherwise, and has not ventured to affirm that she was not cognizant of and consulted with respect to this mortgage. Although we affirm the decree of the Court below, we think it is necessary for us to say that we do not concur in the doubt expressed by the learned Judge at the end of his judgment as to whether the plaintiff's suit would lie at all; for this case being governed by the Dayabhaga, the plaintiff would be entitled to a definite share in the joint property.

Appeal dismissed.

CALCUTTA HIGH COURT.

THE 10TH FEBRUARY 1880.

Before Mr. Justice Morris and Mr. Justice Prinsep.

ROSHUN DOOSADH(1) and two others

versus

THE EMPRESS.

Previous Conviction—Irrelevant Evidence of Character—Quantum of Punishment—Evidence Act (I of 1872), s. 54.

In charging the jury upon the trial of a prisoner for being dishonestly in the possession of stolen goods, the Judge directed the jury to consider the proof of previous convictions for theft as evidence from which inference might fairly be drawn as to the character of the accused.

Held, that this amounted to a misdirection ; for, though s. 54 of Evidence Act declares that "the facts that the accused person has been previously convicted of an offence is relevant," yet the same section also declares that "the fact that he has a bad character is irrelevant," and that the evidence was irrelevant and inadmissible.

Except under very special circumstances, the proper object of using previous conviction is to determine the amount of punishment to be awarded, should the prisoner be convicted of the offence charged.

Prinsep, J. (Morris, J., concurring).—We think that there must be a new trial in this case.

The three persons were charged, under s. 411 of the Indian Penal Code, with having dishonestly been in possession of certain articles claimed by the complainant, as property stolen from his house. A *dohur* and *pugree* were found with the prisoner Roshun. The complainant and a friend identified these as the property of the former. Roshun, on the other hand, stated that they were his, but that statement was unsupported by any evidence. The Sessions Judge was quite correct in putting it to the jury, "to say whether there is any reason to believe that they (the complainant and his friend) have made any mistake;" but he was clearly wrong in adding, "the fact that he (Roshun) has been twice imprisoned for theft is also not without its weight, and should be taken by you into consideration when deciding as to the credibility of the evidence of identification." S. 54 of the Evidence Act, though it declares that "the facts that the accused person has been previously convicted of an offence is relevant," also

declares that "the fact that he has a bad character is irrelevant," except under certain circumstances, which do not exist in the present case. The evidence of the prisoner's previous convictions has been treated by the Sessions Judge as evidence of his character, which he has told the jury to consider in determining the value of his claim to the property found in his possession. In this respect the Sessions Judge has clearly misdirected the jury, because this evidence was irrelevant and inadmissible. He should have merely pointed out to the jury the conflicting claims to this property, and called upon them to determine which they believed, at the same time reminding them that the prisoner was entitled to the benefit of any reasonable doubt. We think that the prisoner Roshun has been prejudiced by this error, and that he ought to have a re-trial. Except under very special circumstances, none of which arise here, the proper object of using convictions is to determine the amount of punishment to be awarded, should the prisoner be convicted of the offence charged.

Re-trial ordered.

CALCUTTA HIGH COURT.

THE 7TH MAY 1880.

Before Mr. Justice Jackson and Mr. Justice Tottenham.

IN THE MATTER OF MONOHUR MOOKERJEE⁽¹⁾ (*Petitioner*).⁽²⁾

Executor by Implication—Probate—Reference—High Court a Court of Concurrent Jurisdiction—Indian Succession Act (X of 1865), ss. 182, 264—Code of Civil Procedure (Act X of 1877), s. 617.

Where A, under the terms of a will, although not expressly appointed an executor, was directed to receive and pay the testator's debts, and to get in and distribute his personal estate,—

Held, that A must be taken to have been appointed under the will an executor by implication. *In the goods of Baylis*⁽³⁾ followed.

The order made by a District Judge on an application for probate not being a final order, cannot be referred for the opinion of the High Court under s. 617 of the Code of Civil Procedure. But the Court will, under certain circumstances, entertain such an application, as a Court of concurrent jurisdiction under s. 268 of the Indian Succession Act.

(1) I. L. R., 5 Calc. 756.

(2) Reference No. 8 of 1880 by J. P. Grant, Esq., the District Judge of Hooghly, under s. 617 of the Civil Procedure Code; referred on the 16th April 1880.

Note.—The sections quoted from the Indian Succession Act will be found in the Hindu Wills Act (XXI of 1870), s. 2.

(3) I. L. R., 1. P. and M., 21.

AN application was made in this case by one Monohur Mookerjee for probate of the will of his father Rajkissen Mookerjee, deceased. The petitioner contended he was entitled to such probate under the terms of the will, which appointed him an executor by implication under s. 182 of the Indian Succession Act. The 4th, 5th, and 8th paragraphs of the will were as follows :—

“That whatever amount shall remain due to me under the terms of the deed of gift from any eldest discarded son Hurry Hur Mookerjee, on account of family expenses, religious expenses, and building expenses, or whatever amount that shall remain due under decree from him, shall be realized and received either amicably or through Court by my second son Monohur Mookerjee.

“That whatever amount is receivable by me under khatta-books, the amount I have in cash in *tahvil*, or treasury, whatever amount shall be realized by law-suits, &c., within nine years after my demise, and the amount that shall remain unrealized, which become receivable within the said nine years, and which shall be received at any time either amicably or through Court of justice, shall be received and obtained by Monohur Mookerjee.

“That Monohur Mookerjee shall receive the profits of the entire properties specified in Schedules Nos. 1, 2, and 3, annexed to this my will, for nine years from the date of my death, after paying Government revenue, law charges, and establishment expenses, &c.; that he shall therefrom pay my debts and legacies made by me under this will; that my other sons shall not be able to lay any claim whatever at any time to the said nine years' profits and arrears of rent, and they shall not be able to call for any account therof; and that he, Monohur Mookerjee, shall, after the expiry of the said nine years, make over the properties specified in the schedules annexed, to the different parties to whom they have been disposed by this will.”

The District Court, before whom the application was made, being in doubt whether, under the terms of the will, the petitioner could be taken to be an executor by implication under the will, referred the case for the opinion of the High Court. In his letter of reference the Judge observed: “According to s. 182 of the Succession Act and its illustrations, it would appear that a necessary implication of appointment of any person as executor can only be in cases where, an express appointment of some other person as

executor has been made by the testator." The learned Judge also referred to the following cases:—*In the goods of Jones*(1) and *in the goods of Toomy*.(2)

The *Advocate-General* (Mr. G. C. Paul) for the petitioner.—The District Judge was in error in making this reference under s. 617 of the Code of Civil Procedure. The order granting or refusing probate would not be a "final order" as contemplated by that section, therefore no reference could be made to the High Court. By the last clause of s. 264 of the Indian Succession Act the High Court can exercise concurring jurisdiction with the District Judge in the exercise of all the powers granted under that Act. The High Court may, therefore, take cognizance of this matter, although not under the reference.

The terms of the will afford ample evidence on which the Court may come to the conclusion that the petitioner was appointed an executor by implication under the will. See *in the goods of Baylis*(3), where the cases quoted by the Court below are noticed and explained. A direction under a will to pay debts, funeral charges, and the expenses of proving the will, is sufficient to constitute the person so directed an executor by implication; section 1, Williams on Executors, (8th Ed.,) 244.

Jackson, J.—This reference was not properly made by the District Judge. It is not a case in which s. 617 authorised a reference to the High Court, as the Judge's order, if made, would not be final; but the learned Advocate-General has asked the Court to take this case up as a Court of concurrent jurisdiction, and, under the circumstances, we have consented to do so. The point appears to us clear enough. The clauses of the will which have been read to us indicate, without doubt, that Monohur Mookerjee is a person—to use the words of Wilde, J., *in the goods of Baylis*(3)—who was authorised "to receive and pay the debts of the testator and to get in all the personal estate," and he has been given full powers for that purpose to collect and receive all debts, and manage the estate for the period of nine years, after the expiry of which he is to distribute it to the various legatees in the manner directed. We think he is entitled to probate.

Application granted.

(1) 2 Sw. and Tr., 155. (2) 3 Sw. and Tr., 562.

(3) L. R., 1 P. and M., 21.

CALCUTTA HIGH COURT.*

THE 26TH APRIL 1879.

*Before Mr. Justice Ainslie and Mr. Justice Broughton.*BHOKTERAM(1) (*Complainant*)

versus

HEERA KOLITA (*Accused*).
C.*Penal Code (Act XLV of 1860), ss. 182, 211—Preliminary Enquiry—Act X of 1872, s. 471.*

An offence under s. 211 of the Penal Code includes an offence under s. 182; it is, therefore, open to a Magistrate to proceed under either section, although, in cases of a more serious nature, it may be that the proper course is to proceed under s. 211; see *Rafee Makomed v. Abbas Khan*.(2)

Ainslie, J. (Broughton, J., concurring).—The prisoner in this case laid an information at the Police thana against Sadheram, Bhokteram, and two others, stating that he suspected them of committing a robbery in his house. The Police officer investigated the case, and being of opinion that the information was false, so reported to the Assistant Commissioner. The Assistant Commissioner on the report passed an order of dismissal, purporting to do so under s. 147 of the Criminal Procedure Code. This the Assistant Commissioner should not have done; no complaint had been made to him by the present prisoner, nor could the report of the Police officer be regarded as a complaint for this purpose, for he had reported that the information was false. Bhokteram then applied to the Assistant Commissioner for leave to prosecute the prisoner under s. 211 of the Indian Penal Code.

No such leave or sanction was necessary, for the offence, if there was one, was not committed before any Court; see s. 468 of the Criminal Procedure Code, and the case of the *Government of Bengal v. Gokool Chunder Chowdry*(3) and *Ram Runjan Bhandari v. Madhub Ghose*.(4) The Assistant Commissioner did not accord or withhold sanction, but referred the case to the Deputy Commissioner, a course equally unnecessary for a prosecution under s. 211.

The Deputy Commissioner said, that “If the Assistant Commissioner is satisfied that Heera gave false information to the Police,

(1) I. L. R., 5 Calc., 184.

(3) 24 W. R., Crim., 41.

(2) 8 W. R., Crim., 67.

(4) 25 W. R., Crim., 83.

intending to injure Bhokteram, he can, on Bhokteram's application, try the case under s. 182, Penal Code."

As no authority from the Deputy Commissioner was required in order that the prosecution might proceed under s. 211, this must be regarded either as mere piece of advice, which, however, the Assistant Commissioner was right to ask if he felt any difficulty, and the Deputy Commissioner was right to give, or as a sanction under s. 467, which requires the sanction of the official superior of the public servant against whom an offence under s. 182 has been committed. The document may be read in two ways. Either, that the application of Bhokteram for sanction to prosecute was sufficient to enable the Assistant Commissioner to proceed and try the case under s. 182, Penal Code, or that if Bhokteram made another application, *i. e.*, a complaint, the Assistant Commissioner might safely proceed to try the case under that section.

The Assistant Commissioner seems to have read it in the former sense. He issued a summons to Heera to take his trial under s. 182, Penal Code, and directed the Police to produce the necessary evidence. Bhokteram appeared and gave evidence, and the prisoner was convicted and sentenced to three months' rigorous imprisonment under s. 182, Penal Code.

Bhokteram does not complain now that he was not allowed to go on with his prosecution under s. 211. But the prisoner, there being no appeal, applied to the Sessions Judge to refer the case to the High Court on two grounds: (1) that he ought to have been tried under s. 211, and not under s. 182, Penal Code; (2) because it was illegal to put him on his trial without giving him an opportunity of proving his case,—*i. e.*, that there really was a theft in his house, and that Bhokteram and Shaderam and the others were *bona fide* suspected of the theft; and the Sessions Judge thinks that there ought to have been a preliminary enquiry.

With regard to the first question the offence under s. 211 includes an offence under s. 182, and there was no reason why, in a case of this nature, proceedings should not be taken under either section, although it may be, that in cases of a more serious nature the proper course would be to proceed under s. 211.

The case of *Raffee Mahomed v. Abbas Khan*(1) was such a case; it could not be dealt with by a Magistrate.

With regard to the second objection, s. 471 directs that there shall be a preliminary enquiry before any person can be committed for trial by the Court itself, or sent by the Court to a Magistrate, the object of such an enquiry being, that the Court may be satisfied that there are good grounds for believing that the offence has been committed. When the prosecution is not undertaken by the Court itself, the power entrusted to the Court, or to the superior officer of the public servant, is intended to be used for the purpose of preventing persons having business before Courts, or public officers, from being harassed by vexatious and groundless prosecutions; and that power is to be exercised by giving or withholding sanction. Here the superior officer has given sanction to the prosecution, and although the "Court" and the superior officer to the public servant may be in some cases one and the same person, it is only when the case arises out of proceedings before him sitting as a Court, civil or criminal, that s. 471 can apply.

It follows, therefore, that we do not think that we ought to interfere on the ground put forward by the Sessions Judge. But as we have the record before us, and observe that the prisoner Heera has been convicted, on what appears to us to be no evidence whatever, except the bare statement of the person originally accused, we think that the conviction ought to be set aside on that ground under the provisions of s. 297 of the Criminal Procedure Code.

Conviction set aside.

CALCUTTA HIGH COURT.

THE 25TH MARCH 1879.

Before Mr. Justice Ainslie and Mr. Justice Broughton.

DEOLIE CHAND⁽¹⁾ and others (*Decree-holders*)

versus

NIRBAN SINGH (*Judgment-debtor*).

Mortgage—Sale to Mortgagee of portion of Mortgaged Property—Resale to Mortgagor—Decree—Equitable right to whole of Property Mortgaged.

A mortgaged a fourteen-annas share in a certain mouza to B. B obtained a decree on his mortgage-bond. Subsequent to his decree B bought from A a two-annas share in the mouza, but at a later period resold the share to A. In execution of another

• • (1) I. L. R., 5 Calc., 253

decree B had obtained against A the twelve-annas share in the mouza belonging to A was put up for sale and purchased by B; B next applied for execution of the decree he had obtained on the mortgage-bond, seeking to sell the two-annas share which remained in the mouza as part of the property mortgaged to him,—

Held, that so long as A had only a twelve-annas share of the property in his possession, B's security was of necessity reduced to that amount, but on A's again becoming the owner of the whole fourteen-annas, B had an equitable right to demand that the fourteen-annas should be held subject to his mortgage.

Ainslie, J. (Broughton, J., concurring) :—

There can be no doubt that at the date of the mortgage there was a two-annas share held by the decree-holder, which has subsequently passed to the judgment-debtors, and which obviously could not be subject to the mortgage at the date thereof. The contract of the judgment-debtor was to hold fourteen-annas subject to a mortgage for the re-payment of the debt due to the appellant. So long as he had only a twelve-annas share in his possession, the mortgage security was of necessity reduced to that amount; but if at any time he became owner of fourteen-annas the creditor had an equitable right to demand that that fourteen-annas should be held subject to his mortgage. This principle has been distinctly recognized in the Specific Relief Act, and it appears to us that there can be no doubt that the decree-holder is equitably entitled to have security as far as it is possible for the debtor to give it, up to the extent of the fourteen-annas for which he contracted.

We, therefore, think that the two-annas share in respect of which there has been a dispute in the Court below, is properly saleable in execution of the appellant's decree, if on taking an account of that which has been realized it is found that there is an outstanding debt.

The appeal must, therefore, be allowed with costs.

Appeal allowed.

CALCUTTA HIGH COURT.

THE 16TH MAY 1879.

Before Mr. Justice Jackson and Mr. Justice McDonell.

BRINDABUN CHUNDER SIRKAR(1) (Defendant)
versus
DHUNUNJOY NUSHKUR (Plaintiff).

Limitation—Right of Occupancy—Res Judicata—Ejectment—Beng. Act VIII of 1869, s. 27—Act VIII of 1859, s. 2—Act X of 1877, s. 13—Possessory Suit.

The plaintiff sued for a declaration of *mourasi mokurari* rights to certain land, and for mesne profits, alleging that he had been wrongfully ejected by the predecessors in title of the defendants. A previous suit on the same cause of action was heard and dismissed on the ground of limitation.

Held, that the present suit was not barred (as *res judicata*) under s. 2 of Act VIII of 1859 (corresponding with Act X of 1877, s. 13), inasmuch as the first suit having been brought after the period allowed by law, the Court in which it was instituted was not competent to hear and determine it.

Held also, that the lower Courts were wrong in giving the plaintiff a decree for possession on the ground of occupancy right, he not having claimed such relief in his plaint.

Bijoya Debia v. Bydonath Deb(2) followed.

Where a ryot, having a mere right of occupancy in certain land, has been wrongfully dispossessed by the zemindar, his suit to recover possession must be brought under s. 27 of Beng. Act VIII of 1869, within one year from the date of dispossession.

Jackson, J. (McDonell, J., concurring).—In our opinion the plaintiff's suit ought to have been dismissed. He claimed to recover possession of jamai land by adjudication of jamai right thereto, together with mesne profits; and the ground of the suit was, that he had obtained a *mourasi potta* under the signature of the naib of the zemindar. The suit was brought *in formā pauperis*, and the plaintiff prayed for a decree for the recovery of possession by adjudication of tenancy right, and for mesne profits.

It appears that, according to the plaint, the plaintiff had been dispossessed not by the present zemindar, but by his predecessors, in the year 1278 (1871). In the year 1281 (1874), the zemindari right of one of the co-sharers was acquired by another co-sharer, and it is now said, the defendants Nos. 1 and 3 are wrongfully

(1) I. L. R., 5 Calc., 246.

(2) 24 W. R., 444.

keeping the plaintiff out of possession of his jamai rights. The suit, therefore, is as against the defendants Nos. 1 and 3, who are zemindars, and against the defendant No. 2, who assisted the zemindars, for possession of the lands as aforesaid.

It seems that a first suit was brought on this cause of action on the 9th December 1875, which was dismissed after hearing on the 8th May 1876, on the ground that, under s. 27 of Beng. Act VIII of 1869, the suit ought to have been brought within one year from the time of dispossession, and not having been so brought, it was barred by limitation. This, therefore, was a second suit upon the same cause of action.

The defendants set up limitation, *res judicata*, and also, as I gather, a denial of the plaintiff's mokurari, for, although the written statement says nothing of the kind, being rather in the form of a petition against the plaintiff being allowed to sue in *forma pauperis*, we are told that another written statement was afterwards put in, which is not before us now, and in that written statement apparently the plaintiff's alleged mokurari tenure was denied by the defendants. The present suit included a much larger claim for mesne profits, and was, therefore, instituted in the Court of the Subordinate Judge.

It was held by that Court, that, although the plaintiff did not acquire a valid mourasi and mokurari interest by virtue of his pottas, he was entitled to recover possession, as he had acquired a right of occupancy, and that right was not legally determin'd. Accordingly the plaintiff got a decree for possession with wasilat for three years next preceding the suit.

On appeal to the District Judge, this judgment was in substance affirmed, and one of the defendants appeals to this Court, and complains in the first place that the plaintiff's suit ought to have been thrown out under s. 2 of the Code of Civil Procedure (Act VIII of 1859).

On this point we do not think that the appellant is right. It seems to us that, inasmuch as the Munsiff considered that the first suit had been brought after the period limited by law, and that consequently it was not open to him to enter into the merits of it, in truth the cause of action had not been heard and determined by a competent Court. Whether the decision of the Munsiff took the form of a dismissal of the suit or otherwise, does not appear to make

any difference. The plaintiff, if his suit was now in time, was entitled to have his cause of action heard and determined, which had not been heard in the previous suit.

The question remains whether the plaintiff had a cause of action, and whether he had brought it in the proper time. It appears that, in the judgment of both Courts, he failed to make out any valid mourasi mokurari title, but then the Courts concur in thinking that he was entitled to recover under the right of occupancy. It was a point taken not in the memorandum of appeal, but at the hearing before the lower Appellate Court, that the plaintiff having failed to establish the jamai title which he had set up, ought not to succeed on the strength of a right of occupancy. This objection was overruled by the lower Appellate Court, but we find that, in a very similar case before the present Chief Justice and Mr. Justice McDonell, in *Bijoya Debia v. Bydonath Deb*(1), such a ground of appeal was held to be valid. The learned Chief Justice says:—"The claim of the plaintiffs is simply to obtain a declaration of their title to the land under a mokurari lease, which they set up. The issues in the case were framed with a view to ascertain the existence and genuineness of this particular lease and title, and it seems to us that the judgment of the lower Appellate Court, negativing the leasehold interest claimed by the plaintiffs, but investing them with an interest of a different character which they never claimed, is erroneous, and that if we were to confirm this judgment, we should be conferring upon the plaintiffs a totally different thing from that for which they brought their suit."

It appears to me that a plaintiff suing to recover possession of land as held under a mourasi mokurari title, and claiming wasilat in respect thereof, not only from the present zemindars, but also from persons who dispossessed him, must bring a suit of an entirely different character from that of a ryot, suing his landlord for the recovery of possession of land in which he has a right of occupancy, and if the plaintiff in the first-mentioned kind of suit fails to make out his allegations, he will clearly not be entitled to fall back upon a cause of action of an entirely different kind. Now the cause of action which the plaintiff did make out in the present case was simply a right to be in occupancy of the land from which he was ejected, and that it seems to me was an injury, the remedy

for which is referred to in s. 27 of Beng. Act VIII of 1869, and must be claimed within one year from the date of ouster.

The pleader for the respondent in this case appears to consider that there is an analogy between the rights of a tenant who, by holding land and paying rent for it for twelve years, acquires a right of occupancy, and the title of a person who by twelve years' adverse possession extinguishes the rights of the previous owner, and himself acquires a title by prescription.

It appears to me that there is no analogy between the two cases. The right, if any, which the plaintiff had in the present case, is created entirely by his continued occupancy of the land. It does not rest upon any grant, it is not in general transferable, and it appears to me that if the tenant desires to maintain that right and have himself to be replaced in the possession which he occupied before ouster, he is bound to bring a suit under s. 27 of Beng. Act VIII of 1869 within one year from the date of dispossession. I think, therefore, that the plaintiff's suit in this case ought to fail, and that the judgments of the Courts below ought to be reversed, and the plaintiff's suit dismissed with costs.

Appeal allowed.

CALCUTTA HIGH COURT.

THE 4TH APRIL AND 9TH MAY 1879.

*Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Jackson
and Mr. Justice Ainslie.*

DHURONIDHUR SEN(1) and others (*Defendants*)
versus
THE AGRA BANK (*Plaintiffs*).

*Injunction to restrain a Decree-holder from enforcing a decree improperly or
illegally obtained—Sale or transfer of Dena Powna.*

A, the proprietor of an indigo concern, which comprised a patni taluq, after mortgaging the entire concern to B, allowed the patni taluq to be sold for arrears of rent under Reg. VIII of 1819; C, the darpatnidar of the taluq, whose rights were thus extinguished, then sued and obtained a decree for damages against A. After C had obtained this decree against A, A sold his equity of redemption in the entire mortgage concern to and by this sale, all the *dena* and *powna*, or liabilities and outstandings of the concern, were transferred from A to B. C then, after notice to B, obtained an order, by which

(1) *Vide I. L. R., 5 Calcutta, 86*

B was made the judgment-debtor in the place of A. B took no proceedings within one year to set aside this order ; but, after the lapse of three years, upon C attempting to execute his decree, instituted the present suit to set aside the order, and for an injunction to restrain C from executing the decree against him.

Held, 1st, that the purchase by B of the *dena powna* of the indigo concern of which A had been the proprietor, did not make B liable to pay the amount, for which C had obtained a decree against A, as damages for the extinguishment of his darpatni right ; 2nd, that the order substituting B for A in the suit for damages was illegal ; 3rd, that, although B was barred by limitation from suing to set aside that order, he was entitled to an injunction restraining C personally from executing the decree against him.

Garth, C. J. (Jackson and Ainslie, J.J., concurring).—A review having been granted in this case upon the ground that the previous judgment of this Court contained an inaccurate statement of the facts, and that a review was necessary for purposes of justice, we are now called upon to decide a second time the appeal which has been preferred from the judgment of Mr. Justice White, whose opinion in the Division Bench prevailed over that of Mr. Justice Mitter. Messrs. Gilmore, McKilligan, and Co., were the proprietors of an indigo business called the “Paikurdanga Concern,” over which the Agra Bank held a mortgage ; one of the properties belonging to that concern was a patni taluq called “Kalabaria,” of which Brojonath had the darpatni; the rent of this patni taluq not being paid, it was sold under the provision of Reg. VIII of 1819 ; and in consequence of that sale Brojonath’s darpatni rights were cancelled. Brojonath then brought a suit against a number of persons including the executors of the deceased members of the firm of Messrs. Gilmore, McKilligan and Co., for the damage which he had sustained by the cancellation of his rights, and he obtained a decree on the 3rd June 1867 for money to be realized from the estate of the original patnidars. This decree was sold to one Giridhur Sen, the predecessor in title of the present defendants. On the 16th August 1869, the executors of Mr. J. P. McKilligan, the last survivor of the firm of Gilmore, McKilligan and Co., sold the Paikurdanga Concern with *dena* and *powna* to the Agra Bank, the present plaintiffs. In 1871, Giridhur Sen applied to the Court, in which the decree for damages had been passed, to substitute the Agra Bank in the place of the original judgment-debtors, on the ground that the Bank had purchased the rights of the Paikurdanga Concern with *dena* and *powna*, and were consequently liable to pay the amount of the decree. A notice of this application was served

on the Manager of the Bank, but he being advised that the Court could not possibly grant the application, did not appear to oppose it.

The application, however, was granted, and the Agra Bank were substituted in the place of the judgment-debtors. In December 1874, the defendants applied to execute the decree against the Agra Bank; and on this occasion the Manager of the Bank opposed the application: this opposition, however, was overruled. He then applied to this Court under s. 15 of the Charter Act, to set aside the order under which the Agra Bank was substituted for the original judgment-debtors, on the ground that the Court had no jurisdiction to make such an order; but this application was refused. The Agra Bank then brought this present suit, praying that the order of substitution might be declared illegal; that the proceedings taken upon it should be set aside; and that the defendants should be restrained from taking proceedings upon it against the plaintiffs. The defendants contended—

1st.—That as the plaintiffs' object was in effect to set aside the order of the 21st of June 1871, and as the suit was not brought within a year from that date, the plaintiffs were barred by limitation (art. 15, sched. ii, of Act IX of 1871).

2ndly.—That as the plaintiffs had not appeared to urge this objection in the execution proceedings, they had no right to do so by a regular suit.

3rdly.—That as the Agra Bank were the mortgagees in possession of the patni taluq which was sold for arrears of rent, it was through their default that the patni taluq was sold and the dar-patnidar's interest cancelled.

4thly.—That as the Agra Bank had become the owner of the business carried on by Gilmore, McKilligan and Co., with *dena* and *powna*, they were liable to satisfy the decree obtained by the defendants' ancestor against Gilmore, McKilligan and Co.

The Subordinate Judge in the Court of first instance held that plaintiffs' claim was barred by limitation; and also that the plaintiffs as assignees of Gilmore, McKilligan, and Co., had become liable to pay the amount of the decree, and consequently dismissed the plaintiffs' suit, and on appeal to this Court the Judges of the Division Bench differed in opinion; Mr. Justice Mitter substantially agreeing with the Court below, and Mr. Justice White deciding that in point of law the plaintiffs were not liable for the

amount of the decree, and that they were entitled to an injunction restraining the defendants from taking further proceedings to enforce that decree. The opinion of Mr. Justice White, being the senior Judge, prevailed. An appeal was then preferred from his decision, and the Appellate Court as originally constituted allowed the appeal, but a review has been granted, and we have now heard the case re-argued. We have already expressed an opinion during the argument that the Agra Bank were not liable to the present defendants for the amount of the decree ; that decree, as it seems to us, had nothing to do with the debts of the indigo concern ; the Agra Bank were in no sense the representatives of Gilmore and Co., and the Subordinate Judge had no right whatever to substitute the Bank in the place of the original judgment-debtors. The only points upon which we have entertained the least doubts are :—

(1) Whether the Agra Bank, having neglected to appear in the execution proceedings, and to urge their objection to the order made by the Court, can now maintain this suit for the purpose of relieving themselves from that order ; and

(2) Whether the suit is barred under art. 15 of the Limitation Act, not having been brought within a year from the time when the order was made.

We are of opinion that the plaintiffs in this suit are entitled to be relieved from the effect of the order in question. That order was made under such circumstances that the plaintiffs had no means, by any proceedings which they might have taken in the former suit, of setting it aside or preventing the defendants from enforcing it ; it is true that in the first instance they had no opportunity of objecting to its being made, but inasmuch as they were not in any sense the representatives of the judgment-debtors, they had certainly good reason to suppose that the Judge would not have made such a mistake as to substitute them in their place. Then the order having been once made, they had no right of appeal against it, and they took the only means in their power of negativing its effect,—1st, by objecting to the application which was made by the defendants to enforce it by execution ; and 2ndly, by applying to this Court under s. 15 of the Charter Act, to set aside the order upon the ground that the Court had no right to make it. Both these attempts having failed, this suit is now the only means by which they can prevent the defendants from making an inequitable

use of the order, which they have unjustly obtained : the proper object of the suit is not to set aside the order, but to restrain the defendants by injunction from enforcing it. The principle laid down in Daniell's Chancery Practice, 3rd edition, p. 1218, is this—it is a general rule illustrated by an abundance of cases that “whenever a party by fraud, accident, mistake, or otherwise,” has obtained an advantage in proceedings in a Court of ordinary jurisdiction, which must necessarily make that Court an instrument of injustice, a Court of equity will interfere to prevent a manifest wrong by “restraining the party whose conscience is thus bound, from using the advantage he has gained.” And in Drury on Injunctions, p 96, where the same subject is discussed, it is said,—“Upon this principle it seems immaterial *where or what the Court is* in which the proceedings are sought to be restrained, provided the *party sought to be restrained* is amenable to the jurisdiction and is capable of being acted on by the process of contempt of Court; and the extension of the jurisdiction of equity to stay proceedings in other Courts, besides Courts of common law and in foreign Courts as well as in Courts within the jurisdiction of the Court of Chancery, becomes, when considered in reference to the principle stated, as rational and intelligible as it is firmly established in practice.” (See also Story's Equity Jurisprudence, ss. 899 and 900.) Acting upon this principle, we quite agree with Mr. Justice White, that although the order of the 3rd of June cannot itself be set aside in this suit, the defendants ought to be restrained by a perpetual injunction from taking any further proceedings upon it as against the plaintiffs. In the view we have taken of this case, there is of course no ground for the objection founded on art. 15 of the Limitation Act. Our judgment will not have the effect of *setting aside the order* in the former suit. It will only be binding on the defendants personally, it will prevent them from unjustly and inequitably availing themselves of an order which was to some extent the result of their own mistake, and certainly of error on the part of the Court who made it.

The appeal will, therefore, be dismissed, and the appellants will pay to the respondents the costs of both hearings.

Appeal dismissed.

THE 21ST MAY 1880.

Present :

*The Hon'ble L. S. Jackson, C. I. E., and the Hon'ble L. R. Tottenham,
Judges.*

*Excavation of tank by a tenant—Damages—Equity—Limitation Act XV of
1877, Schedule II, Arts. 32 and 120.*

KEDARNATH NAG, (*Defendant*), *Appellant,*
versus

KHETTUR PAUL SUTTEERUTNA and BROJENDER NATH MOOKERJEE, trustees
of the estate of the late RAJAH RADHAKANTO DEB BAHADOOR, (*Plain-
tiffs*,) *Respondents*.

Where a tenant in contravention of the terms of his lease excavated a tank, but thereby enhanced the value of the property, without causing any loss to the landlord, the latter was entitled to maintain a suit for damages against the former, but he could in equity recover only nominal damages. Held also that such a suit was governed not by article 32, but by article 120, Schedule II, of the Limitation Act XV of 1877.

The appellant in this case holds a jummah in the estate of the Sobha Bazar Rajah, the late Sir Radhakanto Deb Bahadoor, of which estate the plaintiffs are trustees.

By his lease the defendant was prohibited from digging any tank in this holding without the permission of his lessor. He has, however, excavated a tank, and built pucca ghats, converting the surrounding land into a garden. The plaintiff's brought this suit to compel him to fill up the tank and to restore the land to its original state, or should he fail to do so, to make him pay Rupees 715 as compensation.

The defendant pleaded limitation, and, further, that the tank was excavated with the knowledge and permission of the former executors of the estate, who also made no objection at the time the work was done. The first Court, finding that the tank was made at least 4 years previous to the suit, held that the plea of limitation was established, because it thought that the suit, under Article 32 of the second Sched. of the Act, which prescribes 2 years as the period for a suit against a person for perverting property to purposes other than the specific purpose for which he has a right to use. On the merits the first Court held that the defendant had failed to make out that he had obtained any permission to excavate : but at the same time held that the long silence of the plaintiffs and their

predecessors, who had quietly allowed the defendant to lay out money in improving the property, implied acquiescence on their part. It was considered that in equity the plaintiffs were entitled to no relief, and dismissed the suit.

The Appellate Court was of opinion that the suit did not come under Article 32 of the Limitation Act, but under Article 116, which gives a period of six years. It therefore overruled the Moonsiff's decision that the suit was barred by limitation.

On the merits the Appellate Court held that the defendant had knowingly broken the conditions of his lease, and that he could not be allowed to plead that he had improved the land, or that his lessors had taken no steps to restrain him at the time he made the tank. The Court gave the plaintiffs a decree by which defendant was ordered to fill up the tank within six months, or in default, to pay to plaintiffs a sum of Rupees 300.

The defendant in this second appeal contends that the Lower Court was wrong in overruling the plea of limitation, that under the circumstances, the plaintiffs were not entitled, after so long a period, to an order for the filling up of the tank again with earth ; and that at any rate no more than nominal damages should have been awarded.

As to limitation, we think with the Lower Appellate Court that Article 32 does not apply to this case. It seems to us to fall under Article 120, which gives a period of 6 years.*

But we think that the Lower Appellate Court has erred in not paying regard to the equitable considerations which induced the Moonsiff to dismiss the suit. It is undeniable that the defendant was bound by his agreement not to dig a tank without permission, and it has been found as a fact that he has in this respect committed a breach of his covenant. But the lease does not provide any specific remedy to the landlord in respect of such a breach, and it is for the Court to decide with regard to the circumstances what relief, if any, should be granted.

The plaintiffs might probably have sued to eject the defendant for breach of the conditions of his lease, but they have elected another form of suit in which they claim equitable relief. The question is, what damages have they sustained? The first Court found that there was none, but that on the contrary, the value of the land had been considerably enhanced by the defendant.

It also found that the plaintiffs or their predecessors quietly stood by and allowed defendant to spend his money in improving their property without any attempt to restrain him. It further found that the suit was not brought until 4 years afterwards. None of these findings were displaced by the Appellate Court; but that Court considered them all to be immaterial, and disregarded them. As to the delay in bringing the suit, it observes that plaintiffs explain it by saying that during the greater part of the time, their interests were let out in ijarah. The Court does not say that it considers their explanations sufficient or satisfactory, and it seems impossible to suppose that it could accept it as such. Be that as it may, the delay would come under consideration only after the plaintiffs had shewn that they had sustained damages by the defendant's act. And in fact, it is not now pretended that they have been really endamaged.

This being so very obvious on the face of the case, we on one occasion adjourned the hearing of the appeal, in the hope that the plaintiffs, respondents, would see their way to an amicable adjustment. This, however, their pleader has represented to be impossible. We understand from him that his clients consider it necessary to contest the case to the end, lest other tenants be encouraged to infringe the conditions of their leases, should the present defendant go unpunished. We must therefore deal with the appeal as we think proper. The one fact found against the defendant is that he has broken his covenant; all the other facts found are in his favor, and no substantial damage has been caused to the plaintiffs. It would be inequitable now to require the defendant to restore the land to its original state, or to make him pay substantial damages. On the other hand, it may be conceded to the plaintiffs, that they had a right to vindicate their authority as landlords by bringing the suit. We think, therefore, that they ought to get nominal damages and their costs of suit.

The decrees of the Lower Courts are accordingly set aside, and in their stead a decree will be given to the plaintiffs for one rupee and their costs of the Lower Court. As to the costs of this appeal, we direct that the parties pay their own costs.

P R E F A C E.

A work on the Muhammadan law containing the rules of succession, inheritance, marriage, &c., which at present govern the Muhammadan community of India, and at a price quite within the reach of the legal public, has been long in want. Macnaghten's "Principles of Muhammadan Law" is indeed a work of very high authority, but it does not give the modifications and changes that have been brought about by the legislative enactments and by the authoritative decisions of the courts; and the works of the subsequent writers, such as, Neil Baillie, Shama Churn Sircar, Almaric Rumsey and a few others, are too costly to be available to the generality of the students. It is with a view to supply this want that the present publication has been undertaken. Its plan is the same as that of my work on Hindu law. To the great work of Macnaghten I have prefixed a "Summary" which, it is believed, will render the study of that work comparatively easy; and I have appended to it copious extracts from the works of Neil Baillie, Shama Churn Sircar, Almaric Rumsey, and a few others, to every one of whom my grateful acknowledgments are due for the very valuable aid I have derived from their works. The "Summary" will shew the changes and alterations that have been effected by the enactments of the Legislature, as well as by the decisions of the Courts. It is apprehended, however, that notwithstanding my most anxious endeavours to make the "Summary" accurate, and the "Extracts" full, I may have been guilty of errors and omissions, but this consideration does not deter me from placing before the public this humble contribution, as whenever there may be a doubt, the reader may usefully consult the work of Macnaghten itself, the original authorities (if available) and the Schedule of the Statutes,

Regulations and Acts relating to the Muhammadan law, that have been inserted in this volume. It is superfluous to add that I have spared no pains to render this volume generally useful, and that I was encouraged to its publication by the very cordial reception that my recent work on Hindu law lately met with from the generous public. It is therefore hoped that this humble publication also will meet with their kind patronage, which is earnestly solicited.

SERAMPORE,
March 1, 1881. }

P. C. SEN.

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TABLE OF ABBREVIATIONS.

B. Dig.	... Baillie's Digest of Muhammadan Law.
Bail. M. L.	... Baillie's Muhammadan Law of Inheritance.
B. L. R.	... Bengal Law Reports.
B. L. R., (Sup.)	... Bengal Law Reports, Supplemental Volume.
Bom. H. C. R.	... Bombay High Court Reports.
C.	... Consanguine.*
Elberling	... E. F. Elberling's Treatise on Inheritance, Gift, Will, Sale and Mortgage.
Hed.	... Hedaya.
h. h. s.†	... how high soever.
h. l. s.†	... how low soever.
I. L. R., Calc.	... Indian Law Reports, Calcutta Series.
Ditto, Mad.	... Ditto ditto Madras "
Ditto, Bom.	... Ditto ditto Bombay "
Ditto, All.	... Ditto ditto Allahabad "
L. C.	... Legal Companion.
L. R., I. A.	... Law Reports, Indian Appeals.
Mac. or Macnaghten	Macnaghten's Principles of Muhammadan Law.
Mad. H. C. R.	Madras High Court Reports.
Mat.	... Maternal.
Moore's I. A.	Moore's Indian Appeals.
N.-W. P., H. C. Rep.	North-Western Provinces, High Court Reports.
Pat.	... Paternal.
Rumsey	Almaric Rumsey's Muhammadan Family Inheritance.
Sel. Rep.	... Select Report.
Sirajiyyah	... Al Sirajiyyah translated by Sir William Jones with a Commentary by him.
1 Sircar, p.—	... 1st Volume, Shama Churn Sircar's Muhammadan Law (Tagore Lectures, 1873), page—
2 Sircar, p.—	... 2nd ditto ditto.
W. R.	... Weekly Reporter.
W. R. Sp.	... Ditto Special Number.
U.	... Uterine.

* Means "related through a common male ancestor." Thus consanguine brother means a half brother by the father; the consanguine paternal uncle means the father's half brother by the father, &c.

† These are intended to apply to the preceding, not to the following, word. Thus "son's h. l. s. child" means child of a son h. l. s., not child h. l. s. of a son.

E R R A T A .

<i>Page.</i>	<i>Line.</i>	<i>For.</i>	<i>Read.</i>
xii	22	are excluded	are also excluded
xxiv	8 (side note)	specei	special
xxx	6	person	a person
xxxii	14	shares,	shares
xlvii	3 and 4 (side note)	presumptive as to	—things
xli	4	Marbar	Mazhar
xli	4	All	1 All
xlii	26	ised	ized
liii	16 (side note)	Bequests	Bequest
liii	17	public treasury	Crown

174. A Magistrate cannot, on the petition of a third party, entertain a charge of false complaint, compel the complainants to appear, and convict them under s. 193, Penal Code.—24 W. R. Cr., 32.

175. The form of an accusation by a District Superintendent of Police under s. 193, Penal Code, does not preclude a Magistrate from framing the charge under s. 177; the sanction of the District Superintendent required under s. 168, Act XXV of 1861 to give the Magistrate jurisdiction, need not be express, but may be implied.—16 W. R. Cr., 67.

S. 194.

176. It is not necessary under s. 194, Penal Code, that the false evidence which is given should be evidence given in a Court of Justice. Such statement, if made to a Police officer, would amount to the offence of giving false evidence as defined by s. 191 taken together with s. 118.—20 W. R. Cr., 41.

S. 195.

177. Where a man burns his own house and charges another with doing so, he should be convicted under s. 211, not s. 195.—8 W. R. Cr., 65.

178. Facts showing that an accused person had dug a hole intending to place salt therin, in order that the discovery of the salt so placed might be used in evidence against his enemy in a judicial proceeding, would justify a conviction for an attempt to fabricate false evidence. *Queen v. Nunda.* 4 N. W. P., H. C. R. 133.

179. The prisoner was convicted under s. 195 of the Indian Penal Code of fabricating false evidence with intent to procure the conviction of a certain person of an offence. The prisoner's act was committed in a most public manner and was not calculated to lead to the conviction of the person, nor did it appear that the prisoner took any steps to secure his conviction. *Held*, that the conviction of the prisoner could not be sustained. *Queen v. Shiv Dyal.* 4 N. W. P., H. C. R. 188.

S. 199.

180. A statement made by a witness in a criminal trial not upon oath or solemn affirmation is not a declaration within the meaning of s. 199 of the Penal Code. 4 Mad. H. C. R., 185.

S. 201.

181. S. 201, Penal Code, refers to others than the actual criminals who, by causing disappearance of evidence, assist the principals to escape. The person who commits an offence and afterwards conceals the evidence of it, cannot be punished on both heads of the charge.—7 W. R., Cr., 52.

182. A person cannot be punished under s. 201 of the Indian Penal Code, where the act which caused the disappearance of the evidence of the commission of an offence was not done with the intention of screening the offender from legal punishment. It is not sufficient that the disappearance of evidence was likely to have the effect of screening the offender. *Queen v. Tulsi Rai and Ram Lal Rai.* 5 N. W. P., H. C. R., 186.

183. *Semblé.*—A person cannot be convicted under s. 201 of the Penal Code of causing evidence of the commission of an offence by himself to disappear, nor can he be convicted of the abetment of such an act. *Reg. v. Kashinath Dinkar et al.* 8 Bom. H. C. R. 126.

184. To support a charge of giving false information in respect of a murder known to have been committed, the proper order of proof is (1) that the murder was committed as alleged; (2) that information was given respecting the offence; (3) that such information was false and known to be so; (4) that the prisoner knew of the commission of murder; (5) that his intention was to screen the offender. 3 Mad. H. C. R., 251.

185. Where a person through fear did not interfere to prevent the commission of a murder, but afterwards joined the murderers in concealing the body, he was held guilty, not of abetment of murder, but of causing disappearance of evidence of a crime under s. 201, Penal Code.—6 W. R., Cr., 80.

S. 202.

186. Where *corpus delicti* is not established, there can be no conviction for culpable homicide not amounting to murder nor under s. 202, Penal Code.—4 W. R. Cr., 29.

187. Discussion as to the applicability of s. 422, Act XXV of 1861 to a case, under s. 202, Penal Code, of omission to give information respecting an offence.—18 W. R., Cr., 31.

S. 203.

188. A prisoner's intention is immaterial to his conviction, under s. 203, Penal Code, of having given false information respecting an offence committed.—1 W. R., Cr., 18.

S. 205.

189. Fraudulent gain or benefit to the offender is not an essential element of the offence of false personation under s. 205 of the Penal Code, and a conviction for false personation may be upheld even where the personation is with the consent of the person personated.—1 Mad. H. C. R., 450.

190. To constitute the offence of false personation under s. 205, it is not enough to show the assumption of a fictitious name: it must also appear that the assumed name was used as a means of falsely representing some other individual.—4 Mad. H. C. R., 18.

191. Merely presenting a petition for another person is not false personation of such person under s. 205, Penal Code.—8 W. R. Cr., 80.

S. 206.

192. Fraudulent removal of property with intent to prevent its being taken in execution of a Collector's decree, is punishable under s. 206, Penal Code, and not under s. 145, Act X of 1859.—10 W. R., Cr., 46.

S. 211.

193. It was held to be illegal for a Magistrate to sanction a prosecution under s. 211, Penal Code, (for making a false charge) without giving the petitioner an opportunity of adducing evidence to prove that the charge which he made was a true one.—25 W. R., Cr., 10.

194. To constitute the offence of making a false charge, under s. 211 of the Indian Penal Code, it is enough that the false charge is made and that the charge is not pending at the time of the offender's trial. The *Queen v. Subhanna Gaundan* followed. (See 1 Madras H. C. Rep. 30.) *Empress of India v. Salik. I. L. R.*, I All. 527.

195. If the charge of voluntarily causing hurt, contained in a petition of complaint, is wilfully false, and made with intent to injure, then the complainant is legally chargeable with the offence

described in s. 211 of the Indian Penal Code. *Queen v. Mata Dyal.* 4 N. W. P., H. C. R, 6.

196. A person may in good faith institute a charge which is subsequently found to be false, or he may, with intent to cause injury to an enemy, institute criminal proceedings against him, believing there are good grounds for them, but in neither case has he committed an offence under s. 211 of the Indian Penal Code.

To constitute this offence it must be shown that the person instituting criminal proceedings knew there was no just or lawful ground for such proceedings.

The averment that the accused knew that there were no lawful grounds for the charge instituted is a most material one. *Queen v. Chidla.* 3 N. W. P., H. C. R, 327.

197. To constitute the offence of making a false charge, under s. 211 of the Indian Penal Code, it is enough that the false charge is made though no prosecution is instituted thereon. The *Queen v. Subbanna Gaundan* (1 Mad. H. C. Rep. 30) followed. The *Queen v. Bishoo Barik* (16 W. R., Cr. 77) distinguished. *Empress of India v. Abul Hasan.* I. L. R., 1 All. 497.

198. To constitute the offence of preferring a false charge under this section, the charge need not be made before a Magistrate nor need the charge have been fully heard and dismissed. It is sufficient if it is not pending at the time of trial. 1 Mad. H. C. R., 30.

199. A prisoner convicted under the second clause of s. 211 of the Indian Penal Code, should be sentenced to imprisonment, with or without fine, and not fine alone. *Reg. v. Rama bin Ram-bhaji.* 1 Bom. H. C. R., 34.

200. The refusal to give a stamped receipt for money paid not being itself an offence at law, to make a false charge against a party of refusing to give such a stamped receipt is not an indictable offence. *Reg. v. Gopan Kom Kusaji.* 1 Bom. H. C. R., 92.

73. When he is prepared for the lecture, the preceptor, constantly attentive, must say : " hoa ! read ;" and at the close of the lesson he must say : "take rest."

74. A Bráhmen, beginning and ending a lecture on the *Véda*, must always pronounce to himself the syllable *óm* ; for, unless the syllable *óm* precede, his learning will slip away from him ; and, unless it follow, nothing will be long retained.

75. If he have sitten on culms of *cúsa* with their points towards the east, and be purified by rubbing that holy grass on both his hands, and be further prepared by three suppressions of breath each equal in time to five short vowels, he then may fitly pronounce *óm*.

76. BRAHMÁ milked out *as it were*, from the three *Védas*, the letter A, the letter U, and the letter M, which form by their coalition the triliteral monosyllable, together with three mysterious words, *bhr*, *bhuvah*, *swer*, or *earth*, *sky*, *heaven* :

77. From the three *Védas*, also, the Lord of creatures, incomprehensibly exalted, successively milked out the three measures of that ineffable text, beginning with the word *tad*, and entitled *sávitri* or *gáyatrì*.

78. A priest who shall know the *Véda*, and shall pronounce to himself, both morning and evening, that syllable, and that holy text preceded by the three words, shall attain the sanctity which the *Véda* confers ;

79. And a twice-born man, who shall a thousand times repeat those three (or *óm*, the *vyáhr̥tis*, and the *gáyatrì*,) apart from the multitude, shall be released in a month even from a great offence, as a snake from his slough.

80. The priest, the soldier, and the merchant, who shall neglect this mysterious text, and fail to perform in due season his peculiar acts of piety, shall meet with contempt among the virtuous.

81. The three great immutable words, preceded by the triliteral syllable, and followed by the *gáyatrì* which consists of three measures, must be considered as the mouth or principal part of the *Véda* :

82. Whoever shall repeat, day by day, for three years, without negligence, that sacred text, shall hereafter approach the divine essence, move as freely as air, and assume an ethereal form.

83. The triliteral monosyllable is *an emblem of the Supreme*, the suppressions of breath *with a mind fixed on God* are the highest devotion; but nothing is more exalted than the *gáyatrì*: *a declaration of truth* is more excellent than silence.

84. All rights ordained in the *Véda*, oblations to fire, and solemn sacrifices pass away; but that which passes not away, is declared to be the syllable *óm*, thence called *acshara*: since it is a *symbol of GOD*, the Lord of created beings.

85. The act of repeating his Holy Name is ten times better than the appointed sacrifice; an hundred times better when it is heard by no man; and a thousand times better when it is purely mental:

86. The four domestic sacraments which are accompanied with the appointed sacrifice, are not equal, though all be united, to a sixteenth part of the sacrifice performed by a repetition of the *gáyatrì*:

87. By the sole repetition of the *gáyatrì*, a priest may indubitably attain beatitude, let him perform, or not perform, any other religious act; if he be *Maitra*,* or a *friend to all creatures*, he is *justly named Bráhmaṇa*, or *united to the Great One*.

88. In restraining the organs which run wild among ravishing sensualities, a wise man will apply diligent care, like a charioteer in managing restive horses.

89. Those eleven organs, to which the first sages gave names, I will comprehensively enumerate as the law considers them in due order.

90. The nose is the fifth after the ears, the skin, the eyes, and the tongue; and the organs of speech are reckoned the tenth, after those of excretion and generation, and the hands and feet:

91. Five of them, the ear and the rest in succession, learned men have called organs of sense; and the others, organs of action:

92. The heart must be considered as the eleventh; which, by its natural property, comprises both sense and action; and which being subdued, the two other sets, with five in each, are also controlled.

* The learned translator has, in conformity with the view of his commentator, varied in translating the sentence *maitra Bráhmaṇa uchyaté*, which occurs again in Chap. XI, v. 85.

and its beneficial aim. A Code framed according to the conceptions we have tried to set forth ought not to fail in either requisite. It involves no preference of conjectural anticipation to that clear apprehension of fact which is the only sure foundation of science. In the sphere of legislation, as in other spheres, true reformation is a process of evolution rather than of revolution. The life of a community, as of an individual, implies continuity and assimilation. Society is a complex aggregate, swayed by inherited tendencies, beliefs and sentiments with respect to family-relations, to neighbourly rights and duties, to liberty and property, which no purely speculative plan of legislation would fit. All this is true and of unspeakable importance; but the same study and experience which establish its truth reveal also the capacity for progress which every community presents, the immense efficiency of co-ordinated action, the power to control, to stimulate and to mould a national character, of a reasonable, just and consistent system of laws.

28. It is not necessary or desirable that the principles of human action, and of men's relations, as they appear separately on ultimate analysis, should be the ground of a classification of laws or of the subjects for legislation. If we may resume the comparison to a house, it is plain that in constructing one as well as another, the builder must have regard to the same principles as to strength and applicability of materials, to the same mechanical laws and the same rudiments of design. But a classification of houses—still more of rooms—according to the predominance in them of one or the other of these elements of their construction would be of no service for the ordinary uses of life. For such purposes they are classed according to a set of more obvious external characteristics—their fitness for particular purposes—not because the others are less important, but because habit has taught us to expect a general conformity to a reasonable standard which on occasion we test in the proper way. The classification according to position, shape and fitness brings the objects into connexion along a more extended line of useful and practical ideas than one according to more abtruse resemblances. So in arranging laws, it is not so much the underlying principles of their construction which should determine their classification, as the readiness with which particular series of rules hang together, or group themselves about some central doctrine, by a spontaneous association of ideas.

When we use such words as "marriage," "partnership," "insurance," each of them calls up a train of thought more closely connected in fact, than the artificial combination of the infinitely various concrete instances embraced under such a word as "contract" or as "property." The use of method in legislation, as in arranging the contents of an existing aggregate of laws, is to aid the true conception and the recollection of the individual rules, and to bring out most forcibly their mutual relations in those respects in which they bear on actual practice. A grouping thus determined has somewhat the same relation to a purely abstract system, such as Austin favoured, as the natural system in botany to the Linnæan system. It takes account of the whole being and attributes of the objects to be dealt with, instead of properties of them, determinable indeed, but not by their determination bringing sufficiently together those which for the observer have most significance, and thus combining in each species the objects which in their totality are for him most really and closely related.

29. Another observation of some importance with reference to the arrangement of laws is that the chronological order of their emergence by no means coincides with that which they would occupy either according to the abstract scheme of a speculative jurist, or their co-ordination in a complete system. The practical needs of a society, arising from its moral and physical circumstances, may give rise to an institution at a comparatively early stage of its progress, the logical reasons for which are not disengaged for ages afterwards; while simple and obvious rules spring up in the latest as in the earliest stage to meet by slight adjustment some slight change. Thus Austin's analysis of sovereignty and law followed, not preceded, the practical outgrowth of innumerable institutions logically referrible to the notions thus brought into distinctness; and in the work of practical legislation it would not be possible either to await a final resolution of aggregate right into its irreducible elements, or to make those elements, when ascertained, the basis in their crude individuality of separate jural structures. The facts with which the law has to deal are essentially complex. It must yield, therefore, to the cross-divisions of human affairs, build on organic combinations of primary ideas, and accept great leading principles rather as a permeating influence than as a sole or chief ground of discrimination from each other.

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THE
LEGAL COMPANION.
VOL. IX, 1881.

We beg to acknowledge with thanks the receipt, from Messrs. Thacker, Spink & Co. of Calcutta, of a copy of "the Revenue Sale Law of Bengal" edited with Notes by W. E. H. Forsyth, Esq., Barrister-at-Law and Officiating Assistant Secretary to the Government of Bengal, Legislative Department. It comprises Act XI of 1859, Act VII (B.C.) of 1868, Act VII (B.C.) of 1880, and the Unrepealed Regulations and the Rules of the Board of Revenue regarding revenue sales. All the rulings of the High Court and the Privy Council on the subject have been noted under the respective sections to which they apply. Almost all the difficult and doubtful passages have been fully and clearly explained. All the changes in the law that have taken place from time to time have been pointed out. The author seems to have spared no pains to make his work exceedingly useful to the public. The book has been very neatly got up by Messrs. Thacker, Spink & Co. Its price is Rs. 5 only. We wish the author every success and have no doubt that the work will meet with that extensive sale which it richly deserves. No seminadar, legal practitioner and court should be without a copy.

A FULL BENCH of the Calcutta High Court has ruled in the case of Umasunkur Moitro *versus* Kali Kamal Mozoomdar and another (decided on the 21st June 1880), that :—

"An adopted son, according to the true interpretation of the Hindu law prevailing in Bengal, takes by inheritance from the relatives of his adoptive mother."

A FULL BENCH of the Calcutta High Court has held in the case of Puddo Kumaree Debee *versus* Juggut Kishore Acharjee and another, decided on the 6th May 1879, (*vide* I. L. R., 5 Calc., 615) as follows :—

"The rights of an adopted son, unless curtailed by express texts, are in every respect similar to those of a natural born son."

"The adopted son succeeds to the *sapinda* kinsmen of his father, and as regards the relationship of *sapinda*, there is no difference between the adopted and the natural born son."

[In the above case the ruling in Sumbhoo Chunder Chowdry *versus* Naraini Debi (3 Knappa' P.C., 55; S. C. 1 Suth. P. C. C. 25) was cited and followed, and that in Bhobbum Moye Debi *versus* Ram Kishore Acharji Chowdry was discussed and explained.]

PRIVY COUNCIL.

THE 11TH AND 15TH DECEMBER 1846.

Present:

*Lord Brougham, Lord Langdale, the Right Hon'ble Dr. Lushington,
the Right Hon'ble T. Pemberton Leigh, Sir E. H. East, Bart.,
and Sir E. Ryan, Kt,*

ROBERT WIGRAM CRAWFORD* (Appellant)

versus

RICHARD SPOONER (Respondent).

Construction of Acts.

The true way is to take the words of an Act as the Legislature have given them, and to take the meaning which the words given naturally imply, unless, where the construction of those words is, either by the preamble, or by the context, of the words in question, controlled or altered.

Lord Brougham :—Their Lordships are clearly of opinion that the judgment of the Court of Bombay cannot stand. The construction of the Act must be taken from the bare words of the Act. We cannot find out what possibly may have been the intention of the Legislature; we cannot aid the Legislature's defective phrasing of the Statute; we cannot add, and mend, and, by construction, make up deficiencies which are left there. If the Legislature did intend that which it has not expressed clearly; much more, if the Legislature intended something very different; if the Legislature intended something pretty nearly the opposite of what is said, it is not for Judges to invent something which they do not meet with in the words of the text (aiding their construction of the text always, of course, by the context); it is not for them so to supply a meaning, for, in reality, it would be supplying it: the true way in these cases is, to take the words as the Legislature have given them, and to take the meaning which the words given naturally imply, unless where the construction of those words is, either by the preamble or by the context of the words in question, controlled or altered: and, therefore, if any other meaning was intended than that which the words purport plainly to import, then let another Act supply that meaning, and supply the defect in the previous Act. * * * * *

Digest of Rulings on the Construction of Acts.

A rule of construction is that the enacting words of a statute may be carried beyond the preamble if words be found in the former strong enough for the purpose.—2 Mad. H. C. Rep., 322.

The meaning of an Act is to be gathered solely by reference to the Act itself, without looking into external sources of evidence for the purpose of ascertaining what was or was not the intention of the Legislature.—1 Hyde, 100; 8 W. R. (P. C.), 30; 13 W. R., 85; 20 W. R., 78.

In interpreting an Act of the Legislature, the Court must not take one section only and see what its meaning is, but must take all the sections which relate to the same subject-matter, and look at the Act as a whole and see what was the intention.—23 W. R., 171.

If it appear that words have long been used in a sense which may not improperly be called technical, and have been judicially construed to have a certain meaning, and have been adopted by the Legislature in that sense, the rule of construction of Statutes will require that the words in a Statute should be construed according to the sense in which they have been previously used, although that sense may vary from the strict literal meaning of them.—6 Moore's I. A., 393, *Hunooman Persaud Panday v. Musst. Babooee Munraj Koonweree*; 3 L. C., 197.

It is no answer to the direct provisions of a particular section of an enactment, to say that the enactment was described in terms as an enactment to consolidate, amend and define the provisions of previously existing laws, and that the particular rule contended for is not to be found among the previously existing laws. It is sufficient if the provision relied upon is a part of the Act, whatever the description of the purposes of the Act may be.—(I. L. R., 5 Calc., 300; 8 Legal Companion, 129.)

If an enactment be partly *ultra vires*, and the bad part be divisible from the good, the latter must be regarded valid and binding.—(9. Bom. H. C. Rep., 216.)

A penal statute should, when its meaning is doubtful, be construed in the manner most favorable to the liberties of the subject, and this is more especially so when the penal enactment is of an exceptional character.—I. L. R., 1 Bom., 308. *Reg. v. Bhista bin Mudanha.*

An Act which imposes a tax, due, rate, or toll upon a subject, or which is restrictive of the ordinary rights of a person, as the Limitation Act, must, where its language is ambiguous, be strictly construed, i.e., in favor of the subject. Thus, where the framers of the Surat Bye-Laws imposed a tax of one rupee per Surat man on

"Copper" imported into Surat for consumption, it was held that copper wrought into pits did not fall within the words of the Bye-Law.—(I. L. R., 1 Bom., 19; 8 Bom. H. C. Rep., 213; 4 L. C., 31.)

CALCUTTA HIGH COURT.

THE 30TH APRIL 1880.

Present:

*The Hon'ble J. S. white and the Hon'ble A. T. Maclean.*CHUNDEE CHURN ROY (*Plaintiff*), *Appellant,**versus*SHIB CHUNDER MUNDUL, (*Defendant*), *Respondent.**Right of Fishery—Easement.*

Twenty years' uninterrupted enjoyment of a fishery as of right confers a right of fishing upon the party claiming the user.

*White, J. (Maclean, J., concurring)— * * * **

The Munsiff finding that there was upwards of twenty years' enjoyment of the right to fish proved by the plaintiff, passed a decree in his favor.

The learned Judge in the Lower Appellate Court in reversing that decree, makes this observation,—“Section 26 of the Limitation Act and the 20 years' prescription there spoken to, have no application in the present case, which is not a case of an easement, for the simple reason that there is admittedly no dominant tenement. What the plaintiff claims is not a right appurtenant to any property in his possession. He claims a right in gross, a right to fish in a khal which is admittedly not on his land. He does not say how he came to acquire the right originally. He relies merely upon the alleged fact of having exercised it for a number of years.”

Now, in the first place, the judgment overlooked the fact that the word “easement” as used in the Indian Limitation Act has by force of the interpretation clause, Section 3, a very much more extensive meaning than the word bears in the English law; for it includes “any right not arising from the contract, by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another, or attached to or subsisting upon the land of another.” An easement therefore under this law embraces which in English law is called a profit, a prendre, i.e., a right to enjoy a profit out of the land of another. It is argued that the clause does not extend to a fishery, but I entirely disagree with

the argument. The legal meaning of land "is not only dry land, but also land covered by water;" and I see no reason for holding that the word "land" as used in s. 3 bears other than the legal meaning which ordinarily attaches to the word. Taking land to have the meaning, fish may properly be said to grow or subsist upon it.

Again s. 27 of the Act which contains a proviso applicable to the whole doctrine of the acquisition of easements by possession as laid down in the previous Section expressly mentions water as well as land, and as the word easement has the extended meaning given to it by the interpretation clause, I think that, if there was any doubt on the subject, the language of the proviso makes it clear that the profit arising from water as well as from land was in the contemplation of the Legislature. It would be attributing a singular oversight to the Legislature if we were to suppose that when dealing with profits, a prendre, it intended to omit a right of fishery which is one of the most common class of property enjoyed in this Presidency.

It is true as the Judge says that the right claimed by the plaintiff is not a right appurtenant, but a right in gross. Still a profit, a prendre in gross, which is the technical name of the right claimed by the plaintiff, is a right recognized by the law and may be established by the very same sort of evidence as is used to establish either a profit, a prendre appurtenant on an easement in the ordinary sense of the word.

It is clear therefore that the Judge in dealing with the appeal has fallen into error of law.

The case must therefore go back in order that the Lower Appellate Court may decide upon the evidence of user which the plaintiff has given. Although the Munsiff has found in favor of the plaintiff, the defendant (who is the respondent before us) is entitled to have the opinion of the Lower Appellate Court upon the question whether the user has been of that duration and of that character which confers the right claimed.

The user necessary for the purpose must, as s. 26 of the Limitation Act provides, be an enjoyment as of right without interruption for 20 years.

The Judge in the later part of his judgment alludes again to the Limitation Act, and treating it as doubtful whether the right claimed

was an interest in immoveable property, goes on to say that supposing it was such an interest, the plaintiff have not shewn that he had exercised the right adversely to the defendant for more than 12 years before suit.

This is a misapplication of the law of Limitation. What the plaintiff has to prove in order to establish his right is not 12 years' adverse possession, but 20 years' uninterrupted enjoyment of the fishery as of right. If he gives evidence of such a user, and it is not contradicted by trustworthy evidence on the part of the defendant, it is sufficient to establish the right which the plaintiff claims. * * *

PRIVY COUNCIL.

THE 14TH JUNE 1879.

Present :

*Sir J. W. Colvile, Sir B. Peacock, Sir M. E. Smith
and Sir R. P. Collier.*

RAMASAWMI AIYAN and another (Appellants) vs. VENKATARAMA AIYAN (Respondent).

Adoption—Agreement by natural father as to the extent of inheritance.

An agreement by the natural father that his son should be adopted by a widow on the understanding that he should inherit only a part of the deceased adoptive father's estate is not void, but may be ratified by the son upon his attaining majority.

THEIR Lordships in delivering their judgment observed :—

Some of the circumstances of this case are peculiar. The first adopted son became his father's heir ; on the death of that son after that of his father, the widow became the heir, not of her late husband, but of the adopted son. Whether by the act of adopting another son she, in point of law, divested herself of that estate in favor of the second son may be a question of some nicety, on which their Lordships give no opinion. How far the natural father can, by agreement before the adoption, renounce all or part of his son's rights, so as to bind that son when he becomes of age, is also a question not altogether unattended with difficulty ; although the case of Chitko Raghunath Rajádikah and others *vs.* Panaki, 11 Bom. H. C. R., 199, certainly decides that an agreement on the part of the father, that his son's interest shall be postponed to the life-interest of the widow, is valid and binding. In this case, their Lordships think it enough to decide that the agreement of the natural father which has been set out was not void, but was, at the least, capable of ratification, when his son became of age. * * * * *

CALCUTTA HIGH COURT.

THE 21ST APRIL 1879.

*Before Mr. Justice Mitter and Mr. Justice Tottenham.***JHOTEE SAHOO* (Plaintiff) versus OMESH CHUNDER SIRCAR (Defendant).***Limitation—Appeal filed beyond time—s. 5, cl. b of the Limitation Act (Act IX) of 1871 : (2nd para., s. 5, Act XV of 1877).*

An *ex parte* order under cl. b, s. 5, Act IX of 1871, allowing an appeal to be registered although filed beyond time, may, on a proper cause being shown, be set aside by the Court which made it ; but such an order made by a District Judge cannot be afterwards revoked by a Subordinate Judge upon the appeal coming on for hearing before him.

Mitter, J.—In this case we are of opinion that the Subordinate Judge was not competent to cancel the order of the District Judge by which the appeal of the appellant was allowed to be registered although filed beyond time. Under cl. b, s. 5 of the Limitation Act of 1871, the District Judge, being satisfied that the appellant had sufficient cause for not being able to present the appeal within the prescribed time, allowed it to be registered. No doubt this was an *ex parte* order, because at that time the respondent had not entered appearance, and on a proper cause being shown, such an *ex parte* order is liable to be cancelled by the Court which passed it ; but the Subordinate Judge in this case is not competent to revoke the order of the District Judge. The decision cited by the Subordinate Judge does not support his view of the law. In that case the appeal was ordered to be registered by a single Judge of the Allahabad High Court, and the case coming on for hearing, upon the objection of the respondent, who had not appeared at the time when the appeal was ordered to be registered, the Court held that the appeal should not have been registered, and cancelled the first order. There the same Court, upon proper cause being shown, cancelled the first order.

We therefore set aside the decree of the Lower Appellate Court, dismissing the appeal of the defendant, and remand the case to that Court for retrial.

* *Vide I. L. R., 5, Calc. 1.*

NOTE.—Parallel Case :—A Deputy Magistrate cannot question an order made by his superior sanctioning a prosecution under ss. 182 & 211, Penal Code, I. L. R., 4 Calc., 869 (8 Legal Companion, 45).

CALCUTTA HIGH COURT.

THE 1ST APRIL 1879.

*Before Mr. Justice Birch and Mr. Justice Mitter.*ABDOOL HAKIM* and others (*Plaintiffs*)

versus

DOORGA PROSHAD BANERJEE (*Defendant*).

Champerty—Maintenance—Purchase of an Interest in a Suit—Indian Contract Act (Act IX of 1872), s. 23.

A *bond fide* purchase of a share in a claim about to be enforced by a suit is not void under s. 23 of the Indian Contract Act, and a suit may, after such purchase, be properly brought by the vendee and vendors as co-plaintiffs.

A and *B* having a claim against *C* for Rs. 18,099-3, but not being in circumstances themselves to institute a suit for its enforcement, sold fourteen annas or fourteensixteenths of their claim to *D* for Rs. 4,000; and a suit was then instituted by *A*, *B*, and *D*, against *C*. *O* pleaded that the sale to *D* was void under s. 23 of the Indian Contract Act, and that *A* and *B* could not sue for two annas only of their entire claim. *Held*, that the sale to *D* was not void; that the suit was properly framed; and that even if the sale had been void, the suit by *A* and *B* was not liable to dismissal.

Birch, J.—The plaint sets forth (and for the purposes of this appeal we must assume that what is therein stated is true) that plaintiffs Nos. 1 and 2 were the patnidars of lot Hatpara; and that they granted a “*khai khalasee ijara*” of their patni to the defendant Doorga Proshad from 1870 to 1874, the conditions of the said lease being, that if in consequence of any default to pay the zemindar’s rent on the part of the defendant, the taluk was sold by the Collector for its arrears, the defendant should be liable to the plaintiffs and their heirs for damages for the loss incurred by them by the sale of their patni taluk. That such being the condition, the defendant in breach thereof allowed the tenure to fall into arrears, and the patni was put up to auction and sold by the Collector on the 14th May 1874 for the small sum of Rs. 5,900, far below its value.

* I. L. R., 5 Calc., 4.

NOTE.—Champerty or maintenance must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary. (8 Moore’s Indian Appeals, p. 170, *Fischer v. Kamala Naicker*.) A fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being *per se* opposed to public policy. (I. L. R., 4 Ind. App., 28; 5 Legal Companion, 103, *Ram Coomar Coondoo v. Chander Kanto Mookerjee*.)

Estimating their profits at Rs. 1,187-7-4-1 per annum, and valuing the property at sixteen years' purchase, the plaintiffs, after deducting the Rs. 5,900 realized by the sale, assess their loss at Rs. 13,099-3, which they claim at the hands of the defendant as damages.

The plaint then recites, that plaintiffs Nos. 1 and 2, being unable to incur the expenses of a lawsuit, have sold 14 annas share of their claim to plaintiff No. 3, Sree Narain Mitter, for the sum of Rs. 4,000, and that by virtue of that sale, the said Sree Narain Mitter stands in their place as plaintiff to the extent of fourteen-sixteenths of the sum claimed as damages from the defendant for breach of his agreement.

The District Judge has disposed of the case upon the issues in bar, those issues being—

First.—Is the agreement between plaintiffs Nos. 1 and 2 and plaintiff No. 3 void under s. 23 of the Contract Act?

Second.—If so void, is this suit maintainable for any portion of the damages sought to be recovered?

The Judge states that on the face of the plaint it appears that Rs. 4,000 have been given for the chance of recovering Rs. 11,461, and he is of opinion that this is a clear case of gambling in litigation, and that he ought, therefore, to regard the object of this agreement between plaintiffs Nos. 1 and 2, and plaintiff No. 3, as opposed to public policy, and therefore unlawful; he holds the agreement to be void, and refuses on this ground to try the suit, as far as plaintiff No. 3 is concerned.

The Judge disposes of the suit of plaintiffs Nos. 1 and 2 by saying that it is not competent to them to abandon 14 annas of their claim, and sue "for a two annas share of the unliquidated damages claimed."

Having cited numerous authorities in support of his view, the Judge dismissed the suit with costs.

We think that the Judge has taken an erroneous view of this case, and that his reasoning is opposed to what has been said in some of the judgments which he cites.

Constituted as the Courts of this country are, and untrammelled as they are by any laws regarding maintenance and champerty, what has to be considered in such cases is, to quote the words of the Judicial Committee in the case of *Chedambara Chetty v. Renga Krishna*,

&c. (1),—"whether the transaction is merely the acquisition of an interest in the subject of litigation *bond fide* entered into, or whether it is an unfair or illegitimate transaction got up for the purpose merely of spoil, or of litigation, disturbing the peace of families and carried on from a corrupt and improper motive."

Applying this test to the case before us, we fail to see in the plaint any indication of the suit being tainted with any of the corrupt motives which the Judge attributes to its originators.

We fail to see in it anything "against good policy and justice;" anything "tending to promote unnecessary litigation;" anything "that is in a legal sense immoral, and to the constitution of which a bad motive is in the same sense necessary."

As we understand the suit, it is one brought by a necessitous family, whose members have sustained loss by the carelessness or misconduct of one who had taken a lease of their ancestral property, to obtain satisfaction in the shape of damages from the wrong-doer. Not having the means to defray the costs of the suit, they resort to a man who owns property in the neighbourhood, and get him to supply the funds. He takes upon himself the risks of the litigation, and is to receive, if the litigation is successful, a fourteen-sixteenths share of what is recovered.

Taking the statement of what the agreement is from the plaint, it does not appear to us to be open to the objection of being extortionate or unconscionable; it appears to be a fair agreement, considering the risks of litigation, to supply funds to carry on a suit in consideration of having a share of the proceeds that may be recovered.

Even if the Judge were right in refusing to try the suit as regards plaintiff No. 3, he was certainly not justified in refusing to entertain the suit of plaintiffs Nos. 1 and 2, who had a cause of action to which there was no legal bar.

We reverse the decision of the Judge, and send the case back to him to be tried on its merits. Costs to abide the result.

Appeal allowed.

(1) L. R., 1 Ind. App., 241. 2 Legal Companion, 137.

CALCUTTA HIGH COURT.

THE 25TH MARCH 1879.

*Before Mr. Justice Birch and Mr. Justice Mitter.*OKHOY COOMAR CHUTTOPADHYA* and others (*Plaintiffs*)*versus*MAHATAP CHUNDER BAHADOUR (*Defendant*).*Refund—Suit for a refund of Rent paid in excess—Abatement—Joinder of Causes of Action.*

A person who has obtained a decree for an abatement of rent, payable in respect of a patni held by him on account of lands taken by Government, may afterwards sue for a refund of the rent paid by him, before he instituted the suit for abatement, in excess of the amount justly payable.

Birch, J.—This suit was brought to obtain a refund of the amount paid by the plaintiffs in excess of the rent due to the defendant for three years and a half, from the 1st Kartick 1277, to the end of 1280.

The Subordinate Judge gave the plaintiffs a decree, holding that it was proved that the plaintiffs had paid the whole of the patni rent to the defendant, and that they had done so to save their patni, which otherwise would have been placed in jeopardy by the proceedings taken under the Patni Regulation by the defendant. The Subordinate Judge proceeds to say, that “the land was taken by Government before the plaintiffs’ purchase, and there was no dispute as to the quantity of land taken; the plaintiffs from the time when the lands were taken were entitled to a deduction of rent for the 147 bigas of land so taken, and if, notwithstanding this, the Maharajah’s agents continued to realize the rent of the land which had been taken, he can be justly called upon to repay what he received in excess of the sum to which he was fairly entitled.”

The judgment of the District Judge in appeal is very short. The conclusion at which the Judge has arrived is, that as regards the excess payments made prior to 1st Falgoon 1280, the present suit would not lie, inasmuch as the plaintiffs ought to have included the claim for the refund of all excess payments made prior to the institution of the suit which they brought for abatement of rent in that suit, and that by not having

* *Vide I. L. R., 5 Calc., 24.*

done so they must be held to have relinquished their claim to a refund of the excess rent paid up to the 1st Falgoon 1280, the date of the former suit. The Judge, therefore, modifies the decree of the Subordinate Judge, and gives a decree for the refund of the excess rent paid subsequent to the date of the institution of that suit.

It seems to me that the Judge is wrong in this holding, that the plaintiffs cannot recover the whole of the sum claimed in the present suit. Their former suit was for a determination of the sum that they were to pay as rent in future after obtaining abatement on account of the land taken by Government, and although they might in that suit have included the refund which is the subject of the present claim, the fact of their not having so included it, does not prevent their bringing the present suit.

The result will be that the decision of the District Judge must be reversed, and the judgment of the Subordinate Judge must be restored ; the appeal being decreed with costs.

Mitter, J.—I am also of the same opinion. I desire to add that the District Judge is in error in supposing that the present claim arises out of the same cause of action which was the foundation of the suit for abatement of rent. In the suit for abatement of rent, the plaintiffs' cause of action was, that Government had taken 147 bigas of land for public purposes. In the present case their cause of action is, that the defendant wrongfully received the whole of the patni rent notwithstanding that a portion of the patni had been taken by Government for public purposes. Although by s. 8 of Act VIII of 1859 two claims upon two distinct causes of action, if between the same parties, may be joined together, yet it is quite clear that s. 7 of that Act cannot be pleaded as a bar to the maintenance of this suit, because the two claims were not so combined.

Then as regards the contention of the learned pleader for the respondent, that the plaintiffs might have resisted the zemindar's demand in the proceedings which were taken under Reg. VIII of 1819, I do not think that there is any force in that. The Collector under the provisions of that Regulation could not entertain any claim for abatement of rent.

For these reasons, I am also of opinion that the decree of the first Court must be restored with costs.

CALCUTTA HIGH COURT.

THE 24TH FEBRUARY 1879.

*Before Mr. Justice Ainslie and Mr. Justice Broughton.*SHEO GOLAM LALL* (*Decree-holder*)

versus

BANIPROSAD (*Judgment-debtor*).*Application for Execution—Agreement not to execute under Terms, or Order in conformity with Agreement—Estoppel.*

Where the parties to a suit have by mutual agreement made certain terms and informed the Court of them, and the Court has sanctioned the arrangement and made an order in conformity with it, and the agreement has been acted upon, neither party is at liberty to renege from it.

The question, whether such an agreement does or does not violate the rule that a Court cannot add to its decree, becomes under the circumstances one which the Court will not enter into; the party who seeks to raise such question being estopped by his own conduct, and the action of the Court taken thereunder.

Ainslie, J. (Broughton, J., concurring).—The decree in this case was made on the 13th January 1873 against the respondent. It was put into execution in that year, and there were further applications made from time to time, the result of which has been that the judgment-debtor has obtained the consent of the decree-holder to periodical postponements for periods of six months or so, on the condition of paying him interest at the rate originally of Rs. 18 per cent., and subsequently of Rs. 24 per cent. In each of these, I think certainly in the later petitions, it has been the practice to state the amount due under the decree at the date of the petition, and it has been specially agreed that that amount as principal, with interest thereon, should be paid. At last, some time in February 1877, an application was lodged by the decree-holder, whether as a fresh application for execution of decree, or for continuing proceedings, is immaterial. On the 15th of May 1877, being the date fixed for the sale of the debtor's property, the debtor put in a petition with the consent of the creditor, by which the sum of Rs. 1,692-6-9 was taken

* *Vide I. L. R., 5 Calc. 27.*

NOTE.—Where a Court has a general jurisdiction over the subject-matter of a claim, parties may be held to an agreement that the questions between them should be heard and determined by proceedings contrary to the ordinary *coursus curiae* (L. R., 2 Ind. App., 213, & Legal Companion, 80).

to be the amount of the decree up to date, and it was agreed that in consideration of the creditor allowing the sale to be postponed for six months, the debtor should pay him that sum of Rs. 1,692-6-9 within six months, together with interest thereon at the rate of Rs. 24 per cent. per annum.

The order on that application made by the Court was wrong in form. The proper order would have been to suspend further proceedings, and to put the case on the board for hearing on some early date after the expiry of the six months allowed by the decree-holder. Instead of that, the case was taken off the file, but with this provision that the attachment should remain. The attachment, therefore, was actually in force on the date on which the Civil Procedure Code of 1877 came into force. This application was made on the 24th January 1878 for proceeding with the execution of the decree. It has been drawn up no doubt in the tabular form prescribed by s. 212 of Act VIII of 1859, but there is no prayer in it for attachment, and it is evident that it is an application to proceed upon what the decree-holder understood to be a subsisting attachment. In fact we must take it that, although the Court had irregularly struck the case off the file of pending cases, there was legally an application to execute the decree pending at the time that the Procedure Code of 1859 was repealed, and that this application of the 24th January 1878 was made within a reasonable time, and must be treated as a prayer to the Court to go on with the proceedings which had been instituted under the old Code.

As to the main question, whether the decree-holder is or is not entitled to proceed upon the terms of the agreement of the 15th of May 1877, we think that it is only necessary to refer to the case of *Sadasiva Pillai v. Ramalinga Pillai* (1). In that case their Lordships in the Privy Council, taking notice of the general consensus of the Courts in India as to the construction to be put upon s. 11 of Act XXIII of 1861, accepted the ruling of the Indian Courts, although they stated that, had the matter been *res integra*, they probably would not have taken such a limited view of the matter. But although they accepted the ruling that where the decree is silent as to allowing interest or mesne profits subsequent to the institution of the suit, the Court executing the decree cannot assess or give execution for such interest or mesne profits; they did in that

(1) L. R., 2 Ind. Ap., 219; 4 Legal Companion, 80; 15 B. L. R., p. 388.

suit allow execution to be taken out for mesne profits, which were not specifically included in the decree, but in respect of which the defendant had entered into an agreement to account on the condition of execution of the decree being stayed. Their Lordships were of opinion that this probably was a question relating to the execution of the decree within the meaning of the latter part of s. 11 : but even if it did not come under that, they thought that under the ordinary principles of estoppel, the respondent could not then say that the mesne profits in question were not payable under the decree.

Where parties by mutual agreement make certain terms and inform the Court of them, and the Court sanctions the arrangement and makes an order in conformity with it, either party, who has had the benefit of the arrangement and order, is not at liberty to rescile from the agreement. The question, whether such an agreement does or does not violate the rule that a Court cannot add to its decree, becomes under the circumstances one which the Court will not enter into ; the party who seeks to raise such question being estopped by his own conduct, and the action of the Court taken thereunder.

The judgment of the lower Court must be reversed, and the decree-holder declared entitled to execute his decree in the terms of the agreement of the 15th May 1877.

Appeal dismissed.

CALCUTTA HIGH COURT.

THE 22ND APRIL 1879.

Before Mr. Justice Ainslie and Mr. Justice Broughton.

THE EMPRESS v. ROHIMUDDIN* (No. 1), NAZIR MAHOMED (No. 2),
and SOMIRUDDIN (No. 3).

Murder—Culpable Homicide—Indian Penal Code, s. 300 (exceps. 4 and 5).

Excep. 5 to s. 300 refers to cases where a man consents to submit to the doing of some particular act, either knowing that it will certainly cause death, or that death will be the likely result ; but it does not refer to the running of a risk of death from something which a man intends to avert if he possibly can do so, even by causing the death of the person from whom the danger is to be anticipated.

*Per Broughton, J.—*Excep. 5 to s. 300 is not applicable to the case of a premeditated fight, but points to a case of a different character, such as *suttee*.

* I. L. R., 5 Calc., 31.

CRIMINAL appeal from the order of the Sessions Judge of Backer-gunge.

It appeared that a dispute had arisen between Abdool Lashkur and Abdool Khoondkar concerning a piece of land ; and that, on the 16th April 1878, Abdool Lashkur came with a band of fifty or sixty men, armed with spears and latties, and commenced ploughing the land in dispute ; that the men of Khoondkar, being also armed in like manner, endeavoured to prevent them, and a riot ensued, which, however, was put a stop to by the intervention of certain men of position, who induced Abdool Lashkur to withdraw his men. These men afterwards, on being provoked again, returned ; and in the mêlée that followed, Assuruddin, one of Abdool Khoondkar's party, received a wound, from which he died.

Three men belonging to the party of Abdool Lashkur were arrested, *viz.*, Rohimuddin, Nazir Mahomed, and Somiruddin, and charged under ss. 302, 148, and 149 of the Indian Penal Code.

The Sessions Judge considered that the prisoners could not be found under the circumstances guilty of murder, but at most of culpable homicide not amounting to murder. The evidence clearly established that Assuruddin was present at the riot as a professional lattial under the leadership of one Naziruddin ; and that the deceased and the men with whom he was siding, being also professional spearmen, brought on the fight intentionally, and that they entered into it willingly and with preconsent, being well aware of the risk they ran by so doing. The Sessions Judge therefore found that the case fell under excep. 5 of s. 300 of the Penal Code, by which it is declared that "culpable homicide is not murder when the person whose death is caused being above the age of eighteen years suffers death, or takes the risk of death, with his own consent ;" he, therefore, concurring with the assessors, convicted Rohimuddin, Nazir Mahomed, and Somiruddin, under ss. 304 and 149 of the Penal Code, and sentenced the two first prisoners to ten years' and the third prisoner to five years' rigorous imprisonment.

The prisoners appealed to the High Court.

No one appeared to argue the case.

The judgments of the Court were as follows :—

Ainslie, J..—The Judge and assessors have concurred in finding the prisoners guilty of culpable homicide not amounting to murder committed in the course of a riot, and they have been sentenced

under s. 304 of the Indian Penal Code read with s. 149. Other persons had been previously tried and convicted on account of the same matter. They were convicted of murder under s. 302 read with s. 149, and the conviction and sentence were affirmed by this Court on the 12th November 1878. In the present trial, the Officiating Judge has held that the case comes under the 5th exception of s. 300 of the Penal Code,—“culpable homicide is not murder when the person whose death is caused being above the age of eighteen years, suffers death, or takes the risk of death, with his own consent.” He says, that if “one of a body of professional lattials armed with deadly weapons is killed in a fight which these lattials have voluntarily entered into and provoked,—his death cannot be murder.” And in a previous passage he says:—“They were not obliged to fight for the defence of person or property, but they provoked the fight and entered upon it willingly and with preconsent. They were professional lattials armed with spears, and their adversaries were also armed with spears. They were well aware of the risk they ran, and by their conduct showed that they took that risk willingly.” The facts are briefly these, that certain persons who may be called Lashkur’s party, to which the prisoners belonged, went armed with spears and latties to plough lands claimed by one Abdool Rohim Khoondkar. The latter gathered men, and there was a disturbance, and clods were thrown, but by the mediation of some by-standers a separation was effected. Lashkur’s party began to withdraw, whereon Khoondkar’s party taunted them, and some violence was used towards one Hurri, who was removing his plough. On this, Lashkur’s party returned. Some of Khoondkar’s men prepared themselves for fighting, and a fight occurred, in which Assuruddin, one of Khoondkar’s party, was killed by several spear wounds, and another man was wounded. The evidence shows that these men made deliberate preparations to meet the attack of Lashkur’s men, and that the case cannot come under excep. 4 as a sudden fight in the heat of passion upon a sudden quarrel. The assailants in the first instance had gone out armed with deadly weapons, and at the later stage at which the fight occurred, fighting was deliberately intended by both parties. I cannot concur in the view taken by the Judge, that when persons of full age voluntarily engage in a fight with deadly weapons they take the risk of death with their own consent, and that, as a consequence, culpable homicide occurring in

such a fight is not murder. If this view is correct, the 4th exception would be superfluous. If culpable homicide in a premeditated fight with deadly weapons, is not murder, *a fortiori* unpremeditated culpable homicide in a sudden fight in the heat of passion upon a sudden quarrel, would not be murder. It seems to me that the 4th exception clearly indicates the culpable homicide in a fight is murder unless the fight is unpremeditated, and such as is therein described, sudden in the heat of passion and on a sudden quarrel ; a fight is not *per se* a palliating circumstance, only an unpremeditated fight can be such. Where persons engage in a fight under circumstances which warrant the inference that culpable homicide is premeditated, they are responsible for the consequences to their full extent. I do not think the 5th exception has any application to such a case. I understand that exception to apply to cases where a man consents to submit to the doing of some particular act either knowing that it will certainly cause death, or that death will be likely to be the result ; but it does not refer to the running of a risk of death from something which a man intends to avert if he possibly can do so, even by causing the death of the person from whom the danger is to be anticipated. The extract from the report of the Indian Law Commissioners, given in Morgan and Macpherson's edition of the Penal Code at p. 265, contains instances to which the exception applies, and in my opinion cases of this character only are properly to be dealt with under it. The Judge ought to have convicted the prisoners under s. 302 read with s. 149, Penal Code, and sentenced them accordingly. We annul the sentence and conviction passed by the Officiating Sessions Judge of Backergunge, and convict the prisoners Rohimuddin, Nazir Mahomed, and Somiruddin of the murder of Assuruddin, an offence punishable under s. 302 of the Indian Penal Code, and sentence them to transportation for life.

Broughton, J.—I also think that the prisoners ought to have been convicted of murder under s. 302 coupled with s. 149 of the Indian Penal Code. The common object of the men assembled may have been in the first instance, merely the ejection of the other party from the land, but they had retired, and at the instance of mediators had given up that object. Afterwards the other party challenged them to come on again, and the deceased man and another armed with spears put themselves in a fighting position and awaited the return of the prisoners' party. They

returned, some of them also being armed with spears, and accepted the challenge. The object of those who returned, and among them were the prisoners, was not then to eject the others from the land, but to engage in a deadly fight with spears. A man may be a member of an unlawful assembly as defined in s. 141, and if armed with a deadly weapon may be punishable under s. 144, although no force has been used. If any force is used, he may be punishable under s. 148, and if he be a member of a band of dacoits and murder is committed, he may be punished under s. 396; and in this case there may be no deadly weapon used; if a deadly weapon is used, he may be punished under s. 398. All these instances show that the common object or intention of the assembly may be various, and that it must be judged from the proved circumstances of the case. In the present case the common object or intention of the assembly was clearly to fight in such a way that the weapons they used would be likely to cause, and probably would cause, the death of one of their number, or of one of their opponents. It is said by the Sessions Judge that the man who was slain invited or ran the risk of death, and that this brought the case within excep. 5 of s. 300 of the Indian Penal Code. But if that exception applies to the case, there appears to be no reason for excep. 4. Where there is a fight between two contending parties, it is necessary, in order to apply excep. 4, that the fight should have been sudden and without premeditation, and a fight under any circumstances comprehends the kind of consent to which the Sessions Judge alludes. Here there was a certain time between the challenge and the fight, a short time it may be, but still some time for reflection; the parties were at a distance from each other when the challenge was given, and consequently had time to consider whether they would engage in the fight with deadly weapons or not. They determined to fight, and the death of one of the men was the result. Excep. 5 appears to me to apply to circumstances of a different character, as for instance to a case of *suttee*, not to a premeditated fight. The prisoners have appealed; they say the evidence is not conclusive; and Nazir Mahomed says he had witnesses to prove an *alibi*. Witnesses were examined for the defence, and it does not appear that any were excluded. These witnesses support the case for the prosecution, which is moreover proved by the testimony of wholly

independent witnesses, namely, by the men who offered to mediate, and did in fact effect a cessation of hostilities between the contending parties. The Sessions Judge rightly says that the facts are clearly proved by the witnesses on both sides. But on the question whether the offence was murder or culpable homicide not amounting to murder, I agree in thinking that the Sessions Judge was mistaken. The case in my opinion is a case of murder, and that being so, the prisoners must be sentenced under the circumstances to transportation for life.

Appeal dismissed.

CALCUTTA HIGH COURT.

THE 4TH APRIL 1878.

Before Mr. Justice Birch and Mr. Justice Mitter.

MAHOMED IBRAHIM* and others (*Plaintiffs*)

versus

M. B. MORRISON (*Defendant*).

Limitation—Onus Probandi—Chur Lands—Adverse Possession.

In a suit to recover possession of land under cultivation, when the defendant pleads adverse possession, it is under ordinary circumstances for the plaintiff to show *prima facie* that the cause of action upon which he is suing is not barred by limitation and not for the defendant to prove his adverse possession in the first instance.

When a suit is brought for possession of jungly or unculturable lands, or lands which have never been under cultivation, the rule is different, and the defendant must establish his adverse possession for more than twelve years.

MR. BRANSON and Baboo Chunder Madhub Ghose, Baboo Taruck Nath Sen, and Baboo Pran Nath Pandit for the appellants.

Messrs. Twidale and M. L. Sandel for the respondent.

The facts of this case appear sufficiently from the judgment, which was delivered by—

MITTER, J.—The plaintiffs' claim in this case is in respect of a large tract of chur lands, which was, it is alleged, formed by

* I. L. R., 5 Calc., 36.

NOTE.—As long as reliable evidence of acts of ownership is forthcoming, there is no difference between the proof of possession in the case of *jungle* or uncultivated lands, and that in the case of cultivated lands, and such proof is oftentimes forthcoming, as in the cutting down of trees, or grazing of cattle, or putting up boundary marks, or fences and the like. But it does sometimes happen, that neither party to a suit has exercised any acts of ownership at all over the land in question which are capable of proof, and then in the doubt created by such absence of proof, or of reliable proof, the Court is obliged to resort to evidence of title, and to presume that the party who has the title, has also the possession.—(Observation of GARTH, C. J., in the case of Ram Bandhu v. Kusu Bhattu, 5 Calcutta Law Reports, p. 433.)

the recession of the River Kosi between 1273 and 1275 (1867 and 1869). The plaintiffs allege that the land in suit appertains to their patni of Mouza Khera. The defendant holds a neighbouring mouza called Madhoora. His case is, that the disputed land was thrown up more than twelve years, and that ever since its formation it has been held as part of Mouza Madhoora, to which it really appertains. The lower Court has dismissed the claim as barred by limitation. In appeal it is contended, that this being a chur land, the onus of proving adverse possession for more than twelve years is upon the party who sets up that plea. It has been also urged that, supposing the onus of proof is upon the plaintiff, that onus has been satisfactorily discharged. We agree with the lower Court that the evidence adduced by the plaintiffs, to establish the formation of the chur in dispute within twelve years from the date of suit, is not satisfactory; consequently, if the other contention as to the onus of proof fails, the appeal must be dismissed. It is a settled rule of law in this country that, whenever the plea of limitation is raised, it is for the plaintiff to show *prima facie* that the cause of action upon which he is suing is not barred by limitation. But the case of a chur land has been said to be an exception to this rule, and the reason suggested for this exception is, that chur lands during the first few years of their existence are generally not culturable. To a certain extent this contention seems to us to be correct. Where limitation is pleaded to a suit, the subject-matter of which is chur land not brought under cultivation, it is for the defendant, before he can succeed in his plea, to establish that he has exercised adverse rights of ownership over the disputed land for more than twelve years. But when the suit relates to a piece of chur land already brought under cultivation, the plaintiff, in order to get over the plea of limitation, must at least establish that either the land in suit formed within twelve years or was not in a fit state of cultivation within that period. Otherwise in all cases where the plaintiff shows that a subject-matter of a particular suit was chur in unculturable state some time previously, however remote it may be, even a century before, it would be for the defendant to establish the plea of limitation by proving adverse possession for more than twelve years. This latter rule may seem more reasonable or consonant to justice; but the whole current of decisions being for a very long

time in the other way, it is now too late to adopt it. Several cases were cited before us in support of the appellants' contention. But they are not applicable to the facts of this case. They are simply to the effect that when limitation is pleaded in respect of lands which are either in a jungly or unculturable state, it is for the defendant to substantiate the plea by establishing adverse possession for more than twelve years. But in this case, the land in suit is, and has been, under cultivation for some time past, and consequently the rule laid down in these cases cannot afford any guide for the determination of the question of limitation in this case. However, there is one decision quoted before us which requires special notice, because at the first sight it seems to support the contention of the appellant. It is the case of *Sunnud Ali v. Musst. Kurimoonissa and others.*(1) We have referred to the paper-book of that case, and it shows that no different rule has been laid down in it. It was a suit for possession of a piece of *khal bhuratee* land, and the plea of limitation was overruled by the lower Appellate Court, upon the ground that the suit was brought within twelve years from the time when it became culturable. The defendant preferred a special appeal, and it was then held that if the defendant could show that he took possession of the land before it became fit for cultivation, and at a time which would be beyond twelve years before the date of suit, the suit would be barred by limitation. Consequently what was decided in that case was that there may be adverse possession taken of lands not culturable, but that such possession must be established by the party setting it up. This decision also therefore does not in any way help the appellants.

The appeal is accordingly dismissed with costs.

148. The filing of a vakalutnamah with a false attestation is not the *fabrication of false evidence*. It is necessary to show that it was intended that the false circumstance should appear in evidence in a judicial proceeding, *i. e.*, should appear as part of the evidence on which the judicial officer has to form his judgment, and that the circumstance was of such a nature as might have caused the judicial officer to entertain an erroneous opinion touching some material point in the case.—5 Mad. H. C. R., 373.

149. It is not necessary under s. 194, Penal Code, that the false evidence which is given should be evidence given in a Court of justice. Such statement, if made to a Police officer, would amount to the offence of giving false evidence as defined by s. 191, taken together with s. 118.—20 W. R. Cr., 41.

150. *Quare.*—Whether a party who makes a false verification when no verification is required by law, has committed an offence under s. 192, Penal Code, or s. 24, Act VIII of 1859.—10 W. R. Cr., 31.

151. A number of persons cannot be jointly charged with giving false evidence under s. 193, Penal Code.—16 W. R. Cr., 47.

152. A charge of giving false evidence under s. 193, Penal Code, should state the particular stage of the proceeding in the course of which the prisoner made the alleged false statement.—10 W. R. Cr., 37.

Also the date on which the offence charged was committed, and the Court or officer before whom the false evidence was given.—16 W. R. Cr., 37.

And the statement should be clearly proved to have been made by him.—13 W. R. Cr., 56.

153. A charge of giving false evidence under s. 193, Penal Code, should be precise ; and where the accused is charged with giving false evidence on three different occasions, each occasion should form the subject of a distinct head in the charge.—9 W. R. Cr., 14.

154. A witness falsely deposing in another's name should be charged with giving false evidence under s. 193, and not with cheating under ss. 416 and 419 of the Penal Code.—*Reg. v. Prema Bhika.* 1 Bom. H. C. R., 89.

155. Where a person makes two contradictory statements in the course of a judicial proceeding, he may be tried and convicted

of giving false evidence on a single charge if there is evidence to show which statement is false.—*Reg. v. Ganoji bin Pandaji.* 5 Bom. H. C. R., 49.

156. The accused was convicted of intentionally giving false evidence in a judicial proceeding, in having, as a witness therein, made, on solemn affirmation, a false statement. The proceedings in the trial at which the alleged false evidence was given were subsequently annulled in consequence of the sanction for the prosecution being insufficient.

Held, that the conviction of the accused must be reversed, as the false statement was not made in a stage of a judicial proceeding.—*Reg. v. Ruvji valad Taju.* 8 Bom. H. C. R., 27.

157. When an offence under s. 193 of the Indian Penal Code is established, a conviction under s. 181 is illegal. When the accused made on solemn affirmation a statement before an Income Tax Commissioner which statement the accused knew, or had reason to believe, to be incorrect,—

It was held that such statement amounted to the offence of giving false evidence in a judicial proceeding, under s. 193 of the Indian Penal Code, and was not therefore cognizable by a Full Power Magistrate, as it could not be treated as constituting an offence triable under s. 181 of the Indian Penal Code (making a false statement to a public servant).—*Reg. v. Dayalji Endarsji.* 8 Bom. H. C. R., 21.

158. The Magistrate in a non-judicial proceeding, the object of which was to discover the writer of a scandalous petition, administered oath to A. A was afterwards convicted of giving false evidence in his deposition before the Magistrate. On appeal by A, held that the Magistrate was not justified in administering oath to A, under the circumstances, and therefore the High Court reversed the conviction.—*Reg. v. Jibhai Vaja.* 11 Bom. H. C. R., 11.

159. The making up falsely of accounts with the intention of producing them before a Forest Officer not empowered by law to hold an investigation and take evidence, is not a fabrication of false evidence within the meaning of s. 193 of the Indian Penal Code.—*Reg. v. Ramjirao Jivbajirav.* 12 Bom. H. C. R., 1.

160. Upon a prosecution for giving false evidence, the law does not require proof of a corruption.

It is sufficient that there is proof of intention, and if the statement was false and known by the accused to be false, it may be presumed that in making it the accused intentionally gave false evidence.—*Queen v. Amir Ali Khan*. 3 N.-W. P., 133.

161. The examination of a complainant in reference to the matter of his petition of complaint is an investigation directed by law, and therefore a stage of a judicial proceeding.

Consequently, if in the course of that examination false evidence is intentionally given by the complainant, he is legally chargeable with the offence described in s. 193 of the Indian Penal Code.—*Queen v. Matadyal*. 4 N.-W. P., 6.

162. Where the petitioner was convicted of having voluntarily assisted in concealing stolen Railway pins in a certain person's house, and filed, with a view to having such innocent person punished as an offender, held that the Magistrate was right in convicting and punishing the petitioner for the two separate offences of fabricating false evidence for use in a stage of a judicial proceeding under s. 193 of the Indian Penal Code, and of voluntarily assisting in concealing stolen property under s. 414, I. P. Code.—*The Empress of India v. Ramashur Rai*. I. L. R., 1 All., 379.

163. A person who is called upon to answer to a charge of giving false evidence should know exactly what is the false evidence imputed to him.

A charge "that he, on or about the 15th April 1871, gave false evidence," is not sufficiently specific.

Although the verification of plaints containing false statements is punishable according to the provisions of the law for the time being in force for the punishment of giving or fabricating false evidence, still it is not quite the same thing as giving false evidence.—*Queen v. Sheocharan*. 3 N.-W. P., 314.

164. A Court cannot take cognizance of a bargain to abstain from the prosecution of a person who has committed such an offence as that of wilfully giving false evidence.—*Queen v. Bal Kishen*. 3 N.-W. P., 166.

165. The commitment of certain persons charged, under s. 193, Penal Code, with intentionally giving false evidence, was held illegal, because the sanction of neither the Court before or against which the offence was committed, or of some other Court to which such Court is subordinate, was given.—18 W. R. Cr., 32.

166. A commitment for an offence under s. 193, Penal Code, by the Sessions Judge, was quashed, because, according to s. 472, Act X of 1872, the offence is not one triable exclusively by the Sessions Court.—21 W. R. Cr., 37.

167. A Civil Court has no power to order the commitment of persons for offences under ss. 471, 465, and 193, Penal Code, without holding the preliminary enquiry required by s. 474, Act X of 1872.—22 W. R. Cr., 52.

168. False charge under s. 211, Penal Code, and false evidence under s. 198, are not cognate offences, nor parts of the same offence, but may be punished separately.—7 W. R. Cr., 59.

169. An enquiry by an Assistant Magistrate with a view to tracing the writer of an anonymous letter addressed to him, charging certain persons with murder, and without reference to the truth or otherwise of the charge of murder, is not a stage of a judicial proceeding in which the giving of false evidence is punishable under s. 193, Penal Code.—5 W. R. Cr., 72.

170. Where a false statement is made in a stage of a judicial proceeding before a Magistrate, he ought not to convict under s. 181, Penal Code, but commit to the Sessions under s. 193.—11 W. R. Cr., 24.

171. When a Civil Court sends an offence under s. 193, Penal Code, to a Magistrate for investigation and commitment if necessary, the Magistrate cannot return the case to the Civil Court, nor can the Civil Court, after it has sent a case to the Magistrate, commit it to the Sessions ; but the Magistrate should proceed with the case himself.—12 W. R. Cr., 41.

172. A conviction may be had for giving false evidence under s. 193, Penal Code, even if the evidence be given in matters not judicial (such as before a Collector acting in his fiscal capacity under Reg. XIX of 1814), but it must be proved that the false statement was made under the sanction of the law.—14 W. R. Cr., 24.

173. A charge framed on the model given in Sch. III, Act X of 1872, charging the accused upon two charges with having made contradictory statements in the course of judicial proceedings under s. 193, Penal Code, is a good charge ; and the Court or Jury, if convicting, need not by direct evidence find which of the two statements is false ; all that is necessary being that the Court or Jury should find that the allegations made in the charge are proved.—(F. B.) 21 W. R. Cr., 72. See also 22 W. R. Cr., 2.

52. If he seek long life, he should eat with his face to the east ; if exalted fame, to the south ; if prosperity, to the west ; if truth and its reward, to the north.

53. Let the student, having performed his ablution, always eat his food without distraction of mind ; and, having eaten, let him thrice wash his mouth completely, sprinkling with water the six hollow parts of his head, or his eyes, ears, and nostrils.

54. Let him honour all his food, and eat it without contempt ; when he sees it, let him rejoice and be calm, and pray that he may always obtain it.

55. Food, eaten constantly with respect, gives muscular force and generative power ; but, eaten irreverently, destroys them both.

56. He must beware of giving any man what he leaves ; and of eating anything between morning and evening : he must also beware of eating too much, and of going any whither with a remnant of his food unswallowed.

57. Excessive eating is prejudicial to health, to fame, and to future bliss in Heaven ; it is injurious to virtue, and odious among men : he must, for these reasons, by all means avoid it.

58. Let a Brâhmen at all times perform the ablution with the pure part of his hand denominated from the Véda, or with the part sacred to the Lord of creatures, or with that dedicated to the Gods ; but never with the part named from the Pitrís :

59. The pure part under the root of the thumb is called Brâhma, that at the root of the little finger, Câya ; that at the tips of the fingers, Daiva ; and the part between the thumb and index, Pitrya.

60. Let him first sip water thrice ; then twice wipe his mouth ; and lastly touch with water the six before mentioned cavities, his breast, and his head.

61. He who knows the law and seeks purity will ever perform his ablution with the pure part of his hand, and with water neither hot nor frothy, standing in a lonely place, and turning to the east or the north.

62. A Brâhmen is purified by water that reaches his bosom ; a Cshatriya, by water descending to his throat ; a Vaisya, by water barely taken into his mouth ; a Sûdra, by water touched with the extremity of his lips.

63. A youth of the three highest classes is named *upavīti*, when his right hand is extended for the cord to pass over his head and be fixed on his left shoulder ; when his left hand is extended, that the thread may be placed on his right shoulder, he is called *prāchīnāvīti*; and *nīvīti* when it is fastened on his neck.

64. His girdle, his leathern mantle, his staff, his sacrificial cord, and his ewer, he must throw into the water, when they are worn out or broken, and receive others hallowed by mystical texts.

65. The ceremony of *césanta* or cutting off the hair is ordained for a priest in the sixteenth year from conception; for a soldier, in the twenty-second; for a merchant, two years later than that.

66. The same ceremonies except that of the sacrificial thread must be duly performed for women at the same age and in the same order, that the body may be made perfect; but without any text from the *Véda*:

67. The nuptial ceremony is considered as the complete institution of women, ordained for them in the *Véda*, together with reverence to their husbands, dwelling first in their father's family, the business of the house, and attention to sacred fire.

68. Such is the revealed law of institution for the twice-born; an institution in which their second birth clearly consists, and which causes their advancement in holiness: now learn to what duties they must afterwards apply themselves.

69. The venerable preceptor, having girt his pupil with the thread, must first instruct him in purification, in good customs, in the management of the consecrated fire, and in the holy rites of morning, noon, and evening.

70. When the student is going to read the *Véda*, he must perform an ablution, as the law ordains, with his face to the north, and, having paid scriptural homage, he must receive instruction, wearing a clean vest, his members being duly composed:

71. At the beginning and end of the lecture, he must always clasp both the feet of his preceptor; and he must read with both his hands closed: (this is called scriptural homage.)

72. With crossed hands let him clasp the feet of his tutor, touching the left foot with his left, and the right, with his right hand.

124. In a case of false charge, the Magistrate gave the accused (A) permission under s. 169, Act XXV of 1861, to prosecute the complainant (B) for an offence under s. 211, Penal Code. The Magistrate tried A's complaint as one under s. 211, but he subsequently proved a charge against B under s. 182, Penal Code, and punished him under that Section. *Held*, with reference to s. 168, Act XXV of 1861, that the Magistrate was wrong in framing the charge under s. 182 without the previous sanction of the Criminal Court which heard the previous complaint of B.—13 W. R. Cr., 67.

S. 183.

125. If a bailiff break the doors of a third person, in order to execute a decree against a judgment-debtor, he is a trespasser if it turn out that the person or goods of the debtor are not in the house; and under such circumstances the owner of the house does not, by obstructing the bailiff, render himself punishable under s. 183 or 186 of the Indian Penal Code.—*Reg. v. Gazi Kom Aba Dore*. 7 Bom. H. C. R., 83.

126. Where cumulative sentences under ss. 183 and 353, Penal Code, were held not contrary to s. 71.—14 W. R. Cr., 19.

S. 185.

127. The public servant concerned in an offence described in s. 185 of the Indian Penal Code is not competent himself to try the person committing such offence.—*Queen v. Jagurnath*, 7 N.-W. P., 132.

128. A person is guilty of contempt of lawful authority of public servant under s. 185, Penal Code, by bidding at an auction sale held by a Magistrate and failing to complete the sale.—3 W.R.Cr., 33.

S. 186.

129. Escaping from lawful custody is not obstructing a public servant in the discharge of his public functions within the meaning of s. 186 of the Indian Penal Code.—*Reg. v. Pashu bin Dham-baji Patil*. 2 Bom. H. C. R., 134.

130. Conviction and sentence under s. 186 of the Indian Penal Code reversed, as the conduct of the accused—refusing to accompany a measuring clerk employed under Act I of 1865 (Bom.) to his (the accused's) house and permit to be measured—did not

constitute the offence of obstructing a public servant in discharging his public functions.—*Reg. v. Bhagtidas Bhagrandas.* 5 Bom. H. C. R., 51.

131. The refusal of a cart-owner to give his cart on hire to a Government Officer does not constitute the offence of obstructing a public servant in the discharge of his public functions within the meaning of s. 186 of the Indian Penal Code.—*Reg. v. Dhor Kullan.* 9 Bom. H. C. R., 165.

132. A Mofussil Small Cause Court has no jurisdiction to punish for resistance of a process which it has issued ; but such resistance being an offence under s. 186, Penal Code, it may, under s. 171, Act XXV of 1861, send the accused before a Magistrate to be dealt with according to law.—11 W. R. Cr., 62.

S. 188.

133. An order in writing under s. 62, Act XXV of 1861, is necessary to sustain a charge under s. 188, Penal Code.—17 W. R. Cr., 57.

134. An accused cannot be convicted under s. 188, Penal Code, of knowingly disobeying an order promulgated by a public servant if no such order is on the record.—18 W. R. Cr., 30.

135. Under this section it is absolutely necessary to show that the disobedience caused or tended to cause obstruction, annoyance or injury to any person lawfully employed, or that it caused or tended to cause danger to human life, health or safety, or caused or tended to cause a riot or affray.—4 Mad. H. C. R., 5.

136. An order (under s. 320, Act XXV of 1861 or s. 532, Act X of 1872) declaring that, as between the parties to a contention regarding a right of way over certain land, the land in dispute did not belong to the public, is not one the contravention of which can form the subject of an order under s. 188, Penal Code.—24 W. R. Cr., 20.

137. Taking possession of a field in contravention of an order of a Magistrate is not such a disobedience of an order duly promulgated by a public servant as causes or tends to cause danger to human life within the meaning of the latter part of this section. Therefore a sentence of rigorous imprisonment under such circumstance is illegal.—*Reg. v. Ratanrao M. Chavan.* 3 Bom. H. C. R., 32.

138. A person plying a boat for hire at a distance of three miles from a public ferry cannot be said, with reference to such ferry, to commit "criminal trespass," within the meaning of that term in s. 441 of the Indian Penal Code.

If, when directed by the order of a public servant, duly promulgated to him, to abstain from plying a boat for hire at or on in the immediate vicinity of a public ferry, a person disobeys such direction, he renders himself liable to punishment under the Indian Penal Code.—*Muttra v. Jawahir.* I. L. R., 1 All., 527.

139. No order can be made under s. 528, Act X of 1872, unless there is imminent danger or fear of injury of a serious kind to the public; and where a Magistrate, who had made an order under s. 521, subsequently directed further enquiry to be made, it was held that he must be considered to have abandoned his proceedings under s. 528, and that he should have proceeded under s. 525, instead of fining the party charged under s. 188, Penal Code.—21 W. R. Cr., 86.

139a. The liability to punishment under s. 188, Penal Code, cannot attach to a person who comes in to show cause and submit to the judgment of the Magistrate.—26 W. R. Cr., 7.

Ss. 191—193.

140. The materiality of the subject-matter of the statement is not a substantial part of the offence of giving false evidence in a judicial proceeding, and an indictment under ss. 191 and 193 of the Code, though it does not allege materiality, is good if it alleges sufficiently the substance of the offence.—1 Mad. H. C. R., 38.

141. To constitute the offence of giving false evidence under s. 191 of the Indian Penal Code, it is not necessary that the false evidence given should be material to the case in which it is given.—*Reg. v. Damodhur Ramchandra Kulkarni.* 5 Bom. H. C. R., 68.

142. To establish the offence of giving false evidence, direct proof of the falsity of the statement on which the perjury is assigned is essential. But as to the legitimate evidence for this purpose, the law makes no distinction between the testimony of a witness directly falsifying such statement and the contradictory statement of the person charged; although not made on oath, such a statement when

satisfactorily proved is quite as good evidence in proof of the charge as the criminatory statement of a person charged with any other offence, and on precisely the same ground that it is an admission of the accused person inconsistent with his innocence.

As to the weight to be given to contradictory statements, the sound rule is that a charge of perjury is not maintainable upon proof of one such statement not on oath, or more than one, if proved by a single witness only, unless supported by confirmatory evidence tending to show the falsity of the statement in the charge. With respect to the kind or amount of confirmatory proof required, it must be considered in each case whether the particular evidence offered is sufficient to induce a belief in the truth of the contradictory statement or direct testimony.—6 Mad. H. C. R., 342.

143. The making of any number of false statements in the same deposition is one aggregate case of giving false evidence. Charges of false evidence cannot be multiplied according to the number of false statements contained in the depositions.—6 Mad. H. C. R., 27.

144. When a party makes a false statement while legally bound by solemn affirmation, the fact that the statement was one tending to criminate himself will not justify his acquittal on a charge of giving false evidence.—3 Mad. H. C. R., 29.

145. The words of s. 191, Penal Code, are very general, and do not contain any limitation that the false statement made shall have any bearing upon the matter in issue. It is sufficient to bring a case within that section if the false statement is intentionally given.—16 W. R. Cr., 37.

146. Where a witness was at the beginning of the day solemnly affirmed once for all to speak the truth in all the cases coming before the Court that day,—*Held*, that he might be convicted under s. 193 of the Penal Code of giving false evidence in a suit which came on that day, although he was not affirmed to speak the truth in that suit after it was called on for hearing and the names of the cases in the day's list were not mentioned when the affirmation was administered.—2 Mad. H. C. R., 43.

147. A Hindu convert to Christianity is not under a legal obligation to speak the truth, unless the usual form of oath has been administered.—4 Mad. H. C. R., 185.

CALCUTTA HIGH COURT.

THE 19TH FEBRUARY 1879.

*Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Prinsep.*WAHIDUNNESSA* and others (*Defendants*)

versus

SURGADASS (*Plaintiff*).*Stamped Paper signed in Blank—Liability of Obligor.*

Where a person chooses to entrust to his own man of business a blank paper duly stamped as a bond and signed and sealed by himself, in order that the instrument may be duly drawn up and money raised upon it for his benefit, if the instrument is afterwards duly drawn up and money obtained upon it from persons who have no reason to doubt the *bond fides* of the transaction, it must, in the absence of any evidence to the contrary, be taken that the bond was drawn in accordance with the obligor's wishes and instructions.

THIS was a suit to recover Rs. 36,053, principal and interest, due on a mortgage-bond, dated the 28th April 1868, executed by one Mir Haider, the ancestor of the defendant, in favor of Mohunt Bissumbhur Das, the guru of the plaintiff.

The bond fell due on the 28th April 1869, and Bissumbhur Das having died on the 6th March 1871, his pupil, the present plaintiff, took possession of the properties left by the deceased. It appeared that Bissumbhur Das, in his lifetime, lent a sum of Rs. 16,000 to Mir Haider on the security of a bond pledging certain properties belonging to the latter ; and that a suit was brought on that bond by the present plaintiff against Nawab Mehdi Ali Khan and Mir Jaffer Ali, the general mookhtar and constituted attorney of the said Mir Haider, who, at that time, was in Arabia, and a decree given for the amount on the 18th February 1875, which decree was, however, reversed by the High Court, on the 28th June 1876, on the ground that Mir Haider was not made a party defendant, and that, therefore, no decree passed against either the person or property of Mir Haider could stand.

The plaintiff then brought the present suit on the same bond against the representatives of Mir Haider (who was then dead), asking that the amount of principal and interest due might be realized from the mortgaged properties mentioned in the bond.

* L. L. R., 5 Calc., 39.

The defendants denied that the bond was genuine, and stated that one Mir Ali Akbar, an amla, who had custody of the seal of Mir Haider, had fraudulently filled up the body of the bond and sealed the bond in question with the seal of Mir Haider ; and further contended that the decree of the High Court, dated 25th June 1876, barred the present suit, leave not having been granted to him to bring a fresh suit on the same bond.

The Subordinate Judge held, that the suit was not barred under s. 2 of Act VIII of 1859, inasmuch as the first suit was not heard and determined, but simply dismissed on the ground that Mir Haider being alive ought to have been made a party ; and finding that Mir Haider had been in the habit of entrusting his man of business with his seal, and there being no doubt as to the signature and seal being that of Mir Haider, who had had ample opportunity of denying the validity of the bond at the time when the first suit was brought on the bond (he being at that time alive), but had not done so, he gave the plaintiff a decree.

The defendant appealed to the High Court.

Garth, C. J. (Prinsep, J., concurring).—We think that there is no ground for this appeal, and that the Court below has come to a just conclusion. The first and main point raised by the appellant is, that there is no sufficient evidence to make Mir Haider Ali, the ancestor of the defendants, liable upon the bond in question. Now the first witness called by the plaintiff was a mookhtar in the employ of Mir Hadi Hossein, the uncle of Mir Haider, who lived close by him, and was in the habit of transacting his business, and borrowing money for him by means of bonds. This witness says, that he received from Mir Haider's karpurdaz, Ali Akbar, a blank paper signed and sealed by Mir Haider, and stamped with a bond stamp sufficient to cover Rs. 16,000 ; and that, by the instructions of Mir Hadi Hossein, he drew up the bond in question upon this paper for Rs. 16,000, having no doubts of the correctness of the transaction. It then appears clear from the evidence, that Rs. 16,000 was duly paid by the plaintiffs to Ali Akbar, Mir Haider's karpurdaz, upon the faith and security of this bond. It is now argued by the appellants, that there is no sufficient evidence that Mir Haider did really seal and sign the stamped paper. But the first witness had drawn up several deeds previously, which were sealed and signed by Mir Haider. He speaks positively to the

genuineness of the seal and signature upon this particular bond, and not a question is put to him upon this point on cross-examination. Moreover, it is proved that the bond was afterwards duly registered, so that if any fraud had been practised on Mir Haider, either by his karpurdaz or by his uncle, he could almost certainly have known of it. Then it also appears, from the cross-examination of the first witness, that Mir Haider, when he was afterwards at Mecca, was in communication with Mir Jaffer Ali, one of his own appointed mookhtars, upon the subject of this very bond ; that he wrote to him to make a settlement with regard to it ; and that measures were taken to carry out his directions : whereas, surely, if the bond had been a fraud upon him and unauthorized, he would have repudiated, instead of dealing with it as a valid instrument. There is no evidence whatever on the part of the defendants to contradict or throw suspicion upon the plaintiff's case ; and really the only point which the defendants have seriously attempted to make is, that Mir Haider ought not to be bound by a document of which, so far as appears, he did not know the contents. But we have already observed, in the course of the argument, that in the case of a bill-of-exchange or promissory note, an endorsement made before the instrument is drawn, renders the endorser liable for any amount warranted by the stamp, which may afterwards be filled up upon the face of the bill.—(See Byles on Bills, 6th edition, p. 127.) In *Russel v. Langstaffe* (1), where several promissory notes had been endorsed by the defendant on blank forms without any amount being mentioned, Lord Mansfield says :—“ Nothing is so clear as that an endorsement on a blank note is a letter of credit for an indefinite sum. It does not lie in the defendant's mouth to say that the endorsements were not regular.” But then it is argued, that the principle which would be applicable in the case of a bill or note, would not apply to such an instrument as we have before us, which is not a mere money-bond, but also a pledge by way of mortgage of immoveable property for securing the money borrowed. But no authority has been adduced to satisfy us that there is any good ground for this distinction. If a gentleman in the position of Mir Haider chooses to entrust to his own man of business a blank paper duly stamped as a bond, and signed and sealed by himself, in order that the instrument may be duly drawn

(1) 2 Douglas, 514.

up, and money raised upon it for his benefit, and if the instrument is afterwards drawn up, and money obtained upon it from persons who have no reason to doubt the *bond fides* of the transaction, we surely must take it, in the absence of any evidence to the contrary, that the bond was drawn in accordance with the obligor's wishes and instructions. It would, indeed, be hard upon the plaintiff, who has advanced his money under such circumstances 'upon the faith of the genuineness of the instrument, to be told, that although the obligee undoubtedly intended the money to be raised by means of a bond, that did not authorize Mir Hadi Hossein to pledge the obligee's immoveable property. The probability is, that unless the immoveable property had been pledged, the money could not have been obtained. We think, therefore, that the Court below has rightly found the bond to be genuine and duly authorized ; and we also think that it has awarded a reasonable sum by way of interest. The interest payable under the bond itself was 15 per cent. ; and the interest which the Judge has given to the plaintiff from the time when the bond became payable is 12 per cent., which he says is the customary rate in that part of the country.

The appeal must, therefore, be dismissed with costs.

the general system of the Code. In a well-ordered system a place will be ready for it.

26. A consideration of the first importance in the formation of laws is the character of the machinery by which they will be carried into effect. However well devised they may be in substance to meet the needs of the society for which they are made, yet if they involve theories and ways of regarding the facts they propose to deal with wholly foreign to the conceptions of those who are to apply them, it is inevitable that variations and errors of practice should arise which will largely detract from their success. In order that the administrator should work in the spirit of the legislator, it is necessary that the legislator should first bring himself within the sphere of thought of the administrator. He may enlarge and even transform that sphere by judicious endeavour, but it will not in general admit of sudden expansion or thaumaturgic change. Human stolidity, the force of habit, the faith in professional formulas, the disinclination to analysis of common notions—all these are factors in the problem with which the legislator has to deal. If he is bent rather on practical effect than theoretic excellence, they reconcile him to a slow march, in which his followers may accompany him, as preferable to any flight, however brilliant, in which he will be altogether alone. Thus, to make a law in India practically beneficial, account must be taken of the means of professional education,* of the constitution and relations of the several official ranks, of the special merits and defects of the administrative class, and the traditions in which they have been

* In some provinces necessarily, in others without such apparent necessity, the qualifications for admission to the profession of the law exact little either of technical or general knowledge.

In some provinces, and generally in the Mufassal, except in the cities, where there are law-professorships established by the Government in connexion with a University or Central College, technical education other than self-instruction is not available. The system of apprenticeship is unknown outside the Presidency-towns, nor there always resorted to.

The remuneration of professional assistance is, owing to the poverty of the people generally, meagre; and pleaders without private means are unable to provide themselves with text-books or reports, if they are sufficiently educated to study them. The judges can count on little assistance from the Mufassal Bar in any case that falls outside the range of their daily experience. The parties, at what is too often to them ruinous expense, are compelled to appeal from Court to Court, and eventually find themselves deprived of justice from the unskilfulness with which their cases have been launched or prosecuted in the Court of first instance. No radical improvement is to be expected in the administration of justice in India until the better education of the Mufassal Bar is secured; and having regard to the circumstances of the people, the most effective, because to the Bar the least expensive means of securing this result appear to be the extension of codified law.

trained, as well as of the physical situation, the history and character, of those on whom the law is to operate. Abstract perfection must yield in other ways to the narrowing conditions of actual practice and of work to be done by ordinary officials. This, however, is so far from affording any reason against scientific legislation adapted to eventual consolidation that it supplies an argument in favour of that course. A poor and generally ill-trained class of advocates must derive obvious advantages from the economy and uniformity of method of a well-constructed Code. Busy administrators, dealing off-hand with innumerable details, cannot afford the time, even if they have the turn of mind, when a legal question arises, for sifting a particular Act so as to make themselves by a special study masters of what it says and of the spirit in which it has been written. If, however, all the principal Acts are composed on substantially uniform principles and with reference to higher unities towards which those principles converge, much of the official's labour is saved. He becomes himself penetrated by the spirit of the Code, and naturally brings to bear on the construction of every passage a method of interpretation substantially identical with that of the Legislature itself. The consummation is thus furthered, though it may never be quite achieved, of a uniformity of administration giving full effect everywhere to uniformity of law.

27. If, in endeavouring to state the grounds and principles on which, as we think, sectional and eventually general codification should proceed in India, we have been led into undue prolixity, a reason or an excuse may be found in the existence at this time in this country of a strong current of feeling which is opposed to all systematic legislation whatever. Its influence may not improbably be felt even in England, and by some whose interest in this country entitles them to a full statement of the reasons on which we would base systematic legislation; but, without dwelling on any speculation of that kind, it is, we think, highly desirable that in India, and for Indian purposes, a notion to which indolence and arbitrariness incline us to give a too ready welcome should be met, and if possible, dissipated. The success of laws depends in some degree everywhere—in India in a special degree—on the spirit in which they are received and administered: and the zeal of the great body of functionaries will, we believe, be more heartily engaged in giving effect to a legal system when they perceive its solid ground-work

